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Supreme Court of the United States

OCTOBER TERM, 100 1950 195

No. 454 4

GEORGIA BAILROAD & BANKING COMPANY,
APPELLANT,

U8.

CHARLES D. REDWINE, STATE REVENUE COMMISSIONER

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

FILED NOVEMBER 12, 1949.

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OCTOBER TERM, 1949

No. 454

GEORGIA RAILROAD & BANKING COMPANY, APPELLANT,

228.

CHARLES D. REDWINE, STATE REVENUE COMMISSIONER

APPEAL FROM THE UNITED STATES DISTRICT-COURT FOR THE ** NORTHERN DISTRICT OF GEORGIA

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, NEW-NAN DIVISION

Civil Action No. 185

GEORGIA RAILEOAD & BANKING Co., Plaintiff,

VS.

CHARLES D. REDWINE, STATE REVENUE COMMISSIONER, Defendant

COMPLAINT-Filed February 14, 1949

1

Plaintiff, Georgia Railroad & Banking Company, is a railroad corporation created by the laws of the State of Georgia, with its principal office in Richmond County, Georgia.

 $\mathbf{2}$

Defendant, Charles D. Redwine, is a resident and inhabitant of Fayette County, Georgia, within the Newnan Division of the Northern District of Georgia.

3

Defendant is the State Revenue Commissioner of the State of Georgia.

4

This Honorable Court has jurisdiction of this action for the reason that the action is an ancillary and supplemental action to enforce and carry out the previous decree of this Court, as hereinafter more fully appears, and for the reason that the action arises under the Constitution of the United States, Article I, Section 10, and the Fourteenth Amendment to the Constitution of the United States, Section 1, as hereinafter more fully appears, and also arises under the laws of the United States in that the effect of decrees entered by Courts of the United States is involved, as hereinafter more fully appears. The matter

[fol. 2] in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.

5

Plaintiff was chartered as "Georgia Railroad Company" by special Act of the General Assembly of Georgia approved December 21, 1833. Said Act appears in Georgia Laws 1833, page 256 et seq. Said Act is incorporated herein by reference as fully as to the same extent as if herein set out in full.

6

The name of plaintiff corporation was changed to "Ceorgia Railroad & Banking Company" by the Act of the General Assembly of Georgia assented to December 18, 1835. By Act approved December 25, 1837, plaintiff was authorized to extend its line westward to the Chattahoochee River. Said Act approved December 48, 1835 (Georgia Laws 1835, page 180), and said Act approved December 25, 1837 (Georgia Laws 1837), page 212), are incorporated herein by reference as fully and to the same extent as if herein set out in full.

7

Pursuant to said Acts plaintiff raised capital by offering its stock for subscription and constructed a main line from Augusta, Georgia, to Atlanta, Georgia, a distance of 170.71 miles, more or less, and the Athens branch from Union Point, Georgia, to Athens, Georgia, a distance of 39.42 miles, more or less. Said lines are hereinafter referred to as the "charter tax lines."

8

Plaintiff has subsequently acquired other lines, which are not subject to the special provisions for taxation in said Act of 1933. Said lines are not involved in this litigation.

0

On May 7, 1881, plaintiff, in the exercise of the powers conferred upon it by its said charter, leased its railroad properties to William M. Wadley for the term of 99 years

[fol. 3] from April 1, 1881, and Louisville and Nashville Railroad Company and Atlantic Coast Line Railroad Co. are said Wadley's successors in interest to said lease.

10

Said Act of 1833 provides, among other things:

"The stock of said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of said railroads or any one of them; and after that shall be subject to a tax not exceeding one-half percent per annum on the net proceeds of their investment."

11

Said Act of 1833, quoted in paragraph 10 hereof, is a valid and binding contract between the State of Georgia and plaintiff and limits the taxation of said charter tax lines and all appurtenances thereof to a tax of one-half percent of the net earnings of said lines and prohibits any taxation in excess thereof, and said contract cannot constitutionally be impaired by any law of Georgia. It has been repeatedly so adjudicated in the cases of:

City Council of Augusta v. Georgia Railroad &.

Banking Co., 26 Ga. 651;

State of Georgia v. Georgia Railroad & Banking Co.,

54 Ga. 423;

Georgia Railroad & Banking Co. v. Wright, 132 Fed. 912; Modified and Affirmed by the Supreme Court in 216 U. S. 420;

Louisville & Nashville Railroad Co. v. Wright, 236

U. S. 674.

12

By the Act approved March 9, 1945, (Georgia Laws 1945) page 14, the General Assembly of Georgia enacted, for submission to the people, a constitutional amendment to the Constitution of Georgia, providing, among other things, in Article I, Section III, Paragraph III thereof:

"All exemptions from taxation heretofore granted in corporate charters are declared to be henceforth null and void."

Said constitutional amendment containing the provision quoted in paragraph 12 hereof was ratified by the requisite vote of the voters of Georgia.

14

Acting pursuant to said amendment to the Constitution of Georgia, defendant is threatening to, and unless restrained and enjoined by this Court will, assess against said charter tax lines of plaintiff ad valorem taxes for state, county, school district and municipal taxes for the year 1939 and all subsequent years at the full rate of ad valorem tax imposed by the State of Georgia and at the full rate of ad valorem tax assessed by every county, school district and municipality through which said charter tax lines run, and will proceed against plaintiff to collect said taxes under some or all of the procedures set out in Chapters 92-61, 92-26, 92-27, and 92-28 of the Georgia Code of 1933, and the Act approved January 18, 1938 (Georgia Laws, Extra Session, 1937-1938, page 77 et seq.), as amended by the Act approved February 17, 1943 (Georgia Laws 1943, page 204 et seq.

15

Said amendment of 1945 to the Constitution of Georgia, set out in paragraph 12 hereof, as applied to plaintiff, is unconstitutional and void, for the reason that said amendment, if valid, will impair the obligation of said contract between the State of Georgia and plaintiff, contrary to Sec. 10 of Article I of the Constitution of the United States and for the reasons that said amendment, if applied to this plaintiff, will deprive this plaintiff of its property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.

16

Said laws of Georgia as set out in paragraph 14 thereof, if applied against plaintiff so as to subject the charter tax lines of plaintiff to ad valorem taxes as threatened by deform 5 fendant, are and will be unconstitutional and void as against plaintiff for the reasons that said laws will impair the obligation of said contract between the State of Georgia and plaintiff, contrary to Sec. 10 of Article I of the Constitu-

tion of the United States, and on the grounds that said laws will deprive plaintiff of its property without due process of law contrary to the Fourteenth Amendment of the Constitution of the United States.

17

In the case of Georgia Railroad & Banking Co. v. William A. Wright, Comptroller General of the State of Georgia, No. 1192, in equity, in this Honorable Court, this Honorable Court, on July 3, 1907, entered the following decree, to-wit:

"This cause coming on to be heard upon the bill of complaint of the Georgia Railroad & Banking Company vs. William A. Wright, Comptroller General, and amendments thereto and the exhibits to the same, and the answer and amendment thereof interposed thereto by the defendant, William A. Wright, Comptroller General, and upon the answer of the defendant Wilkes County, and upon the answer of the defendant Taliaferro County, it is

Considered, ordered and adjudged by the court that the Charter of the complainant, to wit: the Act of the Legislature of Georgia of December 21st, 1833, and various other Acts of said Legislature, passed prior to the 1st day of January, 1863, is a valid and binding contract between the State of Georgia, and complainant

the Georgia Railroad & Banking Company;

"That the said Charter cover complainant's main railroad between the cities of Augusta and Atlanta, in said State one hundred and seventy-one miles; its branch railroad between Barnett and the City of Washington in said State, eighteen miles; and its branch railroad between Union Point and the City of Athens, said State, forty miles; and all of the appurtenances of said railroad including their rolling stock; also complainant's franchise to be a corporation and other franchises without reference to the valuation of all of said property, which valuation it is admitted exceeds by four millions of dollars the nominal value of the capital stock of said Company, said excess being produced by natural increase in the value of said property and by renewals, alterations and betterments of the same from time to time by the complainant. The said Charter provides a system of taxation, for said property exclusive of all other taxation, to wit:—one half of one per cent. of the net earnings of said property.

"That all property of complainant other than that [fol. 6] above specified including so much of said property as is represented by four hundred and forty shares of stock subscribed under the Act of Oct. 5, 1868, is liable to taxation under the general tax laws of the State of Georgia.

"It is further ordered, adjudged and decreed that defendant be perpetually enjoined from levying and collecting any taxes, State, county or municipal from said complainant not in accordance with this decree."

"This the 3rd day of July, 1907."

Said cause was appealed to the Supreme Court of the United States and the Supreme Court, on February 21, 1910, issued the following mandate:

by this Court that the decree of the said Circuit Court in this cause be and the same is hereby modified so as to exclude the eighteen miles constituting the Washington Branch Railroad, but in all other respects be, and the same is hereby, affirmed, the costs of this appeal to be divided between Wright, Comptroller General, and The Georgia Railroad & Banking Company.

February 21, 1910."

The mandate of the Supreme Court of the United States was, on May 23, 1910, made the judgment of this Honorable • Court.

18

The record of said case in this Honorable Court, and in the Supreme Court of the United States, is incorporated herein by reference as fully and to the same extent as if herein set out in full.

19

By the Act of the General Assembly of Georgia approved January 18, 1938 (Georgia Laws 1937-1938, page 77 et seq.), the powers, duties and functions of the Comptroller General of Georgia in regard to ad valorem taxation were transferred to the State Revenue Commissioner; and defendant is the successor in office of said William A. Wright, in regard

to all matters relating to ad valorem taxation of railroad companies.

Said decree in this Honorable Court as modified and affirmed by the Supreme Court of the United States con[fol. 7] clusively adjudicates that said Act of the Legislature of Georgia of December 21, 1833, is a valid and binding contract between the State of Georgia and plaintiff, and that said contract covers the property of plaintiff described in said decree as modified by the Supreme Court of the United States, that said charter provides a system of taxation for said property exclusive of all other taxation, to-wit: one-half of one percent of the net earnings of said property, and said decree is res judicata as to said matters and estops defendant herein from attempting to levy or collect any ad valorem taxes on the charter tax lines of plaintiff other than as permitted in said decree.

21

Said decree further perpetually enjoins the defendant therein from levying and collecting any taxes, state, county or municipal, from plaintiff not in accordance with said decree; and defendant herein, as successor in office of the defendant therein, is bound and enjoined by said decree.

22

Plaintiff further shows that in the case of State of Georgia v. Georgia Railroad & Banking Co., in the Superior Court of Fulton County, Georgia, which case was appealed to the Supreme Court of Georgia and there affirmed in the case of State of Georgia v. Georgia Railroad & Banking Co., 54 Ga. 423, it was also adjudicated that the charter of plaintiff was an irrevocable contract between the State of Georgia and plaintiff which exempts its charter tax lines and appurtenances thereto from tax except as provided in said charter, and that any law of Georgia which attempts to impose any other or different tax thereon is unconstitutional and void; and defendant, as a subordinate official of the State of Georgia, the plaintiff therein, is bound by said adjudication and is estopped by said adjudication to deny that said charter is an irrevocable contract preventing the taxation of [fol. 8] plaintiff except as therein provided; and the same is res judicata.

Plaintiff further shows that even if said amendment to the Constitution of Georgia of 1945 is valid and effective to annul and void the exemption from taxation set out in plaintiff's charter, which plaintiff denies, even so, said constitutional provision in terms purports to be and is prospective in operation only and applies only to taxes accruing after the adoption thereof and does not justify the imposition of any taxes prior to the ratification thereof, as attempted by defendant.

24

Plaintiff has paid all of the taxes due by it on its property, other than said charter tax lines and the necessary appurtenances thereto, and has paid tax at the rate of ½% per annum on net proceeds from said charter tax lines and the necessary appurtenances thereto.

25

Plaintiff does not know the exact amount of tax defendant proposes to assess against plaintiff but plaintiff shows that the amount that defendant proposes to assess against plaintiff will be several hundred thousands of dollars.

26

Plaintiff has complied with all conditions precedent to its right to said tax exemption set out in said Act of 1833 and has complied with all the conditions precedent to bringing this action.

27

Unless the threatened acts of defendant are restrained and enjoined by this Honorable Court, plaintiff will suffer irreparable injury.

28

Plaintiff does not have any plain, speedy or efficient [fol. 9] remedy in the Courts of Georgia.

29

Plaintiff does not have any adequate remedy at law.

- (1) That process be issued and served on the defendant as provided by law;
- (2) That defendant be temporarily restrained and temporarily and permanently enjoined from assessing or collecting any ad valorem tax against said charter tax lines of plaintiff and the necessary appurtenances thereto, other than said tax of ½% on the net proceeds therefrom as provided in said Act of 1833;
- (3) That the Court adjudicated that the threatened acts of defendant are and will be a violation of said decree of this Honorable Court as modified and affirmed by the Supreme Court of the United States and that the threatened acts of defendant are and will be a contempt of this Honorable Court.
- (4) That plaintiff have such other and further relief to which it may be entitled in the premises.

Spalding, Sibley, Troutman & Kelley, Robert B. Troutman, Furman Smith, Attorneys for Plaintiff, 434 Trust Company of Georgia Bldg., Atlanta, Georgia.

Duly sworn to by Charles H. Phinizy. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 10] IN UNITED STATES DISTRICT COURT

Answer and Defenses of Defendant-Filed March 7, 1949

First Defense

The complaint fails to state a claim or cause of action against defendant upon which relief can be granted.

Second Defense

The complaint fails to set forth any ground or grounds for equitable relief, and shows on its face that plaintiff has an adequate and complete remedy at law.

Third Defense

The complaint is premature and shows on its face that no action has been taken which could justify the grant of equitable relief.

Fourth Defense

The complaint shows on its face that the same is a suit against the State, and that the State has not consented to be sued herein.

Fifth Defense

On July 16, 1948, the Supreme Court of Georgia in the case of Musgrove vs. Georgia Railroad and Banking Company, No. 16178, rendered a decision and judgment based on a similar complaint brought by the present petitioner against M. E. Thompson as State Revenue Commissioner, later substituting Glenn S. Phillips who succeeded Thompson as State Revenue Commissioner, and finally Downing Musgrove who succeeded Phillips in that office, seeking to prevent the Commissioner of Revenue from making an assessment against plaintiff's railroad for ad valorem taxes, which plaintiff alleged was exempted from the payment of such taxes by virtue of its charter granted in 1833 and subsequently amended. Defendant says that since the same action brought by the same petitioner against the same public office has been adjudicated by the Supreme [fol. 11] Court of Georgia as a suit against the State without the consent of the State, that the present suit is res judicata, and that plaintiff is estopped by that judgment from proceeding in this Honorable Court to raise again the same identical issue. The judgment of the Supreme Court of Georgia was subsequently affirmed in effect by the United States Supreme Court when that Court refused to grant a writ of certiorari. Defendant pleads both of these decisions and judgments as a defense to the present case, and incorporates the same herein by reference as fully and to the same extent as if herein set out in full. A portion of the Supreme Court of Georgia ruling in reference to this matter cited in 49 S. E. 2nd, page 26, and quoted from page 27, is as follows:

"Held: Whether the petition be construed as one brought against the defendant in his official capacity or in his individual capacity, it was in substance and effect an action against the State and was not maintainable, the State not having concented to be thus sued."

On page 35 of the above decision, the Supreme Court of Georgia held as follows:

"1. The plaintiff does not claim that the State has in fact consented to be sued in this case, but, as to this phase, it simply contends that the suit is against the defendant as an individual, and is therefore not a suit The suit was originally brought against the State. against the defendant in his representative capacity as State Revenue Commissioner of the State of Georgia' but this express denomination was later stricken by amendment. Whether or not, in view of other references to the defendant as an official which remained in the petition after such amendment, it could be said that the petition as amended is in name a suit against [fol. 12] the defendant solely in his individual capacity, is immaterial, if upon a consideration of the petition as a whole, including the relief which it seeks at appears that the action is in reality a suit against the State, brought without its consent. 'Where a suit is brought against an officer or agency of the State with relation to some matter in which the defendant represents the State in action and liability, and the State, while not a party to the record, is the real party against which relief is sought, so that the judgment for plaintiff, although nominally against the named defendant as an individual or entity distinct from the State, will operate to control the action of the State or subject it to liability, such is in effect one against the State.' The statement just quoted accords with the generally accepted rule, and we are of the opinion that the present suit is an action against the State within this ruling."

Sixth Defense

The complaint shows on its face that this Honorable Court is without jurisdiction over the defendant, since the case as laid seeks to allege a cause of action against the State, and the State has not consented to be sued in the premises.

Seventh Defense

The complaint is defective in law and equity, in that plaintiff seeks the aid of this Honorable Court in protecting its interest alleged to have been created by virtue of a contract with the State of Georgia entered into by legislative enactment in 1833 and amended in 1835, but nowhere in the complaint does plaintiff allege that it has complied with the provisions of the alleged contract. Defendant states that until and unless plaintiff will allege a compliance on [fol. 13] its part with the terms of the alleged contract, it would certainly have no standing in a court of equity against the State of Georgia or its duly authorized officials.

Eighth Defense

Defendant admits paragraphs 1, 2 and 3 of the complaint.

Ninth Defense

Defendant denies paragraph 4 of the complaint.

Tenth Defense

Defendant says that paragraphs 5 and 6 of the complaint require no answer in that said laws referred to therein speak for themselves. Defendant however, does deny the implication contained in these paragraphs that any of these laws granted a binding exemption from taxation to plaintiff. For further answer, defendant says that none of the laws referred to authorized an exemption from taxation as contended for by plaintiff in this suit.

Eleventh Defense

For want of sufficient information, defendant can neither admit nor deny the allegations contained in Paragraph 7 of the complaint, but requires strict proof thereof.

Twelfth Defense

Defendant admits paragraphs 8, 9 and 10 of the complaint, except that defendant denies that any of the lines of plaintiff are entitled to a special tax exemption.

Thirteenth Defense

Defendant denies paragraph 11 of the complaint.

Fourteenth Defense

Defendant admits paragraphs 12 and 13 of the complaint.

Fifteenth Defense

Defendant demes paragraph 14 of the complaint as alleged, and for further answer states that as Commissioner of Revenue of the State of Georgia, he has in the past and will continue in the future to follow all the laws in reference [fol. 14] to the discharge of his official duties. Defendant denies the right of this Honorable Court to issue an injunction against the State of Georgia based solely upon an alleged threat or mental reservation pertaining to plaintiff. An assessment has not been issued and no action, legal or otherwise, has presently been instituted against plaintiff and the future conduct and action of the State of Georgia will be in accordance with law.

Sixteenth Defense

Defendant denies paragraphs 15 and 16 of the complaint.

Seventeenth Defense

Defendant denies paragraph 17 of the complaint, and, states that the case of Georgia Railroad and Banking Company vs. William A. Wright, Comptroller General of the State of Georgia, No. 1192, decided by this Honorable Court on July 3, 1907, is not res judicata of the issues now presented in this case. It is premature on the part of plaintiff to assume the legal points to be raised by the State of Georgia in any future proceedings, and to attempt to have this Honorable Court adjudicate that such issues which may be presented by the State of Georgia will be identical with those presented in the case decided on July 3, 1907, by this Honorable Court. No issue was presented in that case as to whether the proceeding was directed against the State of Georgia or against William A. Wright as an individual. If such suit was directed against Wright as an individual, then clearly it would not bind a different person or the State of Georgia in a subsequent proceeding under different facts for a different taxable year. Defendant incorporates herein by reference the entire decision, judgment and record of this Honorable Court in the present case above referred to. Defendant likewise states that the mandate issued by the United States Supreme Court

of February 21, 1910, which in part sustained the lower court, is not res judicata or an estoppel against future proceedings which may be instituted by the State of Georgia involving additional or different facts, different tax years or different parties.

[fol. 15] . Eighteenth Defense

Defendant admits paragraph 18 of the complaint.

Nineteenth Defense

Defendant denies paragraph 19 of the complaint as alleged, and states that the duties of the present defendant are defined by law and those functions formerly vested in the Comptroller General and which have been transferred to the Commissioner of Revenue, are plainly set forth in the laws of this State.

Twentieth Defense

Defendant denies paragraph 20 of the complaint.

Twenty-first Defense

Defendant denies paragraphs 21, 22, 23 and 24 of the complaint.

Twenty-second Defense.

For want of sufficient information defendant can neither admit nor deny the allegations of paragraph 25 of the complaint, but requires strict proof thereof. Since plaintiff's present action is premature, it is to be expected that plaintiff could not know the amount of any proposed assessment which may be assessed against it.

Twenty-third Defense

Defendant denies paragraphs 26, 27, 28 and 29 of the complaint.

Wherefore, defendant prays that this Answer and the several defenses thereof be sustained on each and every ground, and that the complaint be dismissed with the cost of this proceeding assessed against plaintiff.

Eugene Cook, Attorney General; Claude Shaw, Deputy Assistant Attorney General; Martin Peabody, Assistant Attorney General.

[File endorsement omitted.]

[fol. 16] Duly sworn to by Charles D. Redwine. Jurat omitted in printing.

GEORGIA,

40

Fulton County:

I, Claude Shaw, Deputy Assistant Attorney General, do hereby aver that I have this day mailed a copy of the foregoing Answer and Defenses to Spalding, Sibley, Troutman and Kelly, at their office address, 434 Trust Company of Georgia Building, Atlanta, Georgia, under proper postage.

This 7th day of March, 1949.

Claude Shaw, Deputy Assistant Attorney General.

[fol. 17] IN UNITED STATES DISTRICT COURT

AMENDMENT TO ANSWER AND MOTION TO DISMISS—Filed April 11, 1949

Now comes the defendant, Charles D. Redwine, State Revenue Commissioner, and with leave of court first obtained, amends his original answer and motion to dismiss, by adding the following defenses thereto:

Twenty-fourth Defense

Defendant shows that the petition should be dismissed for the following reasons, to-wit:

I

(a) The judgment and decree sought to be enforced is void and of no effect insofar as to be binding on the defendant, Charles D. Redwine, Commissioner of Revenue of the State of Georgia. Neither said Charles D. Redwine nor the State of Georgia was a party in the action upon which the judgment sought to be enforced was based: Neither appeared and defended said action nor waived the right to be heard, and hence, neither the Circuit Court rendering the judgment nor the United States Supreme Court to which it was appealed, had any jurisdiction to render any judgment binding on the said Charles D. Redwine nor the State of Georgia.

- (b) The State of Georgia not being a party to said action and not having appeared and defended, neither of the foregoing courts had any power to adjudicate and declare the liabilities of the State of Georgia under the alleged contract which plaintiff claimed it had entered into with the State of Georgia.
- (c) Under the ruling of the United States Supreme Court on appeal from the judgment rendered in the Federal court, its judgment as to taxes for one year was not res judicata as to taxes for other years. Hence, the court rendering the decree had no power to enjoin the collection of any taxes other than for the year 1903 which the defendant at that time was attempting to assess, and hence said judgment and [fol. 18] decree could not validly prohibit the attempt to assess and collect taxes for future years, taxes for each year being a different cause of action.
- (d) The decree sought to be enforced against this defendant itself, construed under the Supreme Court ruling, does not attempt to enjoin Wright, the defendant therein, from assessing and collecting taxes for future years, but merely enjoined him perpetually from attempting to assess and collect taxes for the year 1903 described in the petition, and which he was then attempting to collect.
- (e) The construction of said decree as enjoining Wright and his successors in office now sought by the plaintiff would render the judgment void, because it would not follow the ruling of the United States Supreme Court made on appeal in which it held that judgment for taxes for one year is not resejudicate as to other years, and that being the law of the case, this court should not extend the decree over and beyond the law of the case as set forth in the decision of the United States Supreme Court.
- (f) This action is brought on the erroneous theory that the original action against Wright, the defendant in the judgment sought to be enforced, was brought against him in his official capacity as Comptroller General, but the record of said case shows that it was against Wright in his individual capacity, and hence the judgment could not be binding against anyone except Wright himself, and not being against Wright in his official capacity, the decision does not affect his successor in office which defendant is not, defend-

ant's office being an entirely new and distinct office separate from and having no connection with the office of Comptroller-General.

(g) The present action is against Charles D. Redwine in his individual capacity and it seeks to engraft a judgment rendered against another party in the other party's individual capacity, and seeks to enjoin a cause of action different from that in said judgment, that is, taxes for years other than those on which the original judgment was granted.

[fol. 19] Twenty-Fifth Defense

. Defendant says that said petition should be dismissed. and its prayers denied for the reason that plaintiff is atotempting to claim benefits from a charter granted by the State to it without complying with the requirements of the charter and performing the duties placed by said charter upon said plaintiff, and by reason of said failure on the part of the plaintiff to comply, it is guilty of a breach of contract which precludes it from demanding perpetual rights and privileges granted in said charter. Defendant shows in part the breach of contract by plaintiff: The Act of 1833 creating the Georgia Railroad Company required that corporation to construct a branch of railroad from the main line to Eatonton, Georgia, and plaintiff has never built this line. The building of this branch railroad was one of the considerations of the granting of the charter creating the corporation, and the plaintiff has no right to maintain this action until said railroad has been built.

Twenty-Sixth Defense

Defendant says further that said petition should be dismissed and its prayers be denied insofar as it applies to that portion of the railroad running from Madison, Mergan County, Georgia, to Atlanta, Fulton County, Georgia, a distance of 67 miles, because that portion was built under the provisions of the Act of 1837, and the construction was allowed by the State as a privilege, and so stated in the Act, and no tax exemption was contracted therein. The only wording in said Act which could possibly be construed as in any way approaching the tax exemption was the granting in said Act of all the immunities in the construc-

tion of the railroad as was contained in the previous Acts. The only immunity, in the construction granted in the previous Acts was the immunity from injunction. The authority to build this 67 miles being a mere privilege, the State was authorized to withdraw at will any tax exemption which might have been included therein.

[fol. 20] Twenty-Seventh Defense

Defendant says further that said petition should be dismissed and the prayers therein denied for the reason that the portion of Section 15 of the Act of 1833 relied on by plaintiff is repugnant to and in conflict with the Constitution of the State of Georgia of 1798, which Constitution was in force at the time of said Act, to-wit:

- 1. The General Assembly of Georgia at that time had no power to grant perpetual tax exemption to any person, or to bind all future legislatures from changing any law enacted, and contract away the sovereign power of taxation of the State of Georgia so that the people of Georgia could never recover this sovereign power.
- 2. The said portion of Section XV is in conflict with Section XXII, Article I of the Constitution of 1798, which reads as follows:

"The General Assembly shall have power to make all laws and ordinances which they shall deem necessary and proper for the good of the State which shall not be repugnant to this Constitution."

because this provision of the Constitution limits the General Assembly to the passage of those laws which are not repugnant to this Constitution, either according to the letter or according to the spirit. An alienation of the sovereign power of the State is repugnant to the sovereign rights of the people of Georgia which was retained by the Constitution.

3. Said Section of the Act is further repugnant to said Section of the Constitution because said section, if held valid, would forbid all future legislatures from eracting any law under the provisions of said section of the Constitution withdrawing the grant of said element of sovereignty over a part of the territory of Georgia because under said

provision of the Constitution the General Assembly of any year had power to enact any law coming under the provisions of said Section of the Constitution, unhampered by [fol. 21] what a preceding legislature had done, and the legislature was not forbidden the right to levy tax on all property within its jurisdiction.

- 4. The said portion of Section XV is further repugnant to the Constitution of 1798 and in conflict with Section XXIII of Article I, which limits the authority of the General Assembly and declares the rights of the people in the following words:
 - ". . . and this convention composed of the immediate representatives of the people chosen by them to assert their rights, and to revise the powers given by them to the government, and from whose will all ruling authority of right flows, doth assert and declare the boundaries of this State to be as follows . . . (giving the boundaries of Georgia.) Including and comprehending all the lands and waters within the said limits, boundaries and jurisdictional rights."

for the reason that:

- (a) Said portion of Section XV is an alienation of the soverignty of the State over said Georgia Railroad Company:
- (b) Said portion of Section XV is an attempt by one legislative body to preempt the right and prerogatives of succeeding legislatures; and
- (c) Said quoted portion of the Constitution reserved to the people of the State the jurisdictional rights, including the right to tax, over the Georgia Railroad Company, and said Section XV was and is in violation of said jurisdictional rights.

This exemption provision, set out in Section XV of the Act of 1833, is especially repugnant to the following portion of said Section XXIII of Article I of the Constitution of 1798:

"And this convention doth further declare and assert, that all the territory without the present temporary line and within the limits aforesaid, is now of [fol. 22] right the property of the free citizens of the

State, and held by them in sovereignty, inalienable but by their consent."

because this alienation of an essential element of sovereignty is in direct conflict with this provision of the Constitution because only the free citizens of Georgia had the power to alienate this portion of the sovereignty of the State, and the legislature had no power to bind the free citizens of Georgia to such a contract of alienation of sovereign powers.

- (5) The granting of this portion of the sovereignty of the State of Georgia by the legislature is further prohibited by said Section XXIII of said Article wherein, after authorizing the legislature to convey to the United States government the western territory of the State, the legislature is authorized as follows:
 - ". . . and may procure an extension of settlement, and an extinguishment of Indian claims in and to the vacant territory of this State, to the east and north of the said river Chattahoochee, to which territory such power of contract or sale by the legislature, shall not extend."

This allied grant of the element of sovereignty to said Georgia Railroad Company was over territory to which the power of the legislature to contract did not extend, and was indeed forbidden.

Twenty-eighth Defense

Defendant says further, that said petition should be dismissed because Section 23 of Article I of the Constitution of 1798 as set forth in the extracts above retained to the people of the State all the powers of sovereignty over its territory, and by reason of said retention, reserved to the people the power to adopt constitutions which would revoke any law that the legislature might pass which would attempt to alienate the State's sovereign power, and in [fol. 23] both the Constitution of 1877 and that of 1945, the people of Georgia as authorized by the 14th Amendment to the Federal Constitution which forbids any State to deny any person the equal protection of the laws, adopted a Constitution which would give all persons the equal pro-

tection of the law relating to ad valorem taxes, and voided any laws which the legislature had heretofore made attempting to alienate the sovereign power of taxation, and the portion of said Section 15 of the Act of 1833 is in conflict with the Constitution of 1877 and or 1945. It is in conflict with Paragraph I, Section I, Article 4 of the Constitution of 1877, which reads as follows:

"Taxation, a sovereign right. The right of taxation, is a sovereign right-inalienable, indestructible-is the life of the State, and rightfully belongs to the people in all Republican governments, and neither the General, nor any, nor all other departments of the Government established by this Constitution, shall ever have the authority to irrevocably give, grant, limit, or restrain this right; and all laws, grants, contracts and all other acts, whatsoever by said government, or any department thereof to effect any of these purposes, shall be and are hereby, declared to be null and void for every purpose whatsoever; and said right of taxation shall always be under the complete control of, and revocable by, the State, notwithstanding any gift, grant, or contract, whatsoever, by the General Assembly.'

It conflicts with Article I Paragraph 3, Section 3 of the Constitution of Georgia of 1945 which reads as follows:

"Revocation of tax exemptions. All exemptions from taxation heretofore granted in corporate charters are declared to be henceforth sull and void."

[fol. 24] Twenty-ninth Defense

The petition should be dismissed for the reason that the relief prayed for is forbidden under the provisions of Title 28, Section 1341 as amended by Congress in 1948, said section as amended reading as follows:

"Section 1341. Taxes by States. The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law, where a plain, speedy and efficient remedy may be had in the courts of such State."

The laws of Georgia provide speedy and efficient remedies to the plaintiff. Code Sections 92-8426.4 and 92-8426.5 pro-

vide that if there is any dispute between the State Revenue Commissioner and the railroad company, there shall be an arbitration as to the valuation. This is appealable to the superior court. When the valuation is fixed it becomes the duty of the State Revenue Commissioner to levy the tax upon the valuation as fixed. This decision of the State Revenue Commissioner may be appealed to the superior court under the foregoing Section 92-8426.4. The plaintiff in this case has three ample, speedy and efficient remedies through which it can litigate with the State as to any rights of tax exemption it might have: First, appeal to the superior court from the levy by the State Revenue Commissioner; Second, pay the taxes levied and sue the State Revenue Commissioner for refund with interest at 6% for any taxes paid the State as provided by Code Section 92-8436, and third, permit execution to be issued and levied and file affidavit of illegality as provided by Code Section 92-8426.4. In the foregoing, the State has provided the remedies for plaintiff, if any it has.

Thirtieth Defense

Defendant is State Revenue Commissioner and is required by the laws of Georgia to assess the value of railroad corporations for the purpose of levying a tax for the State, counties, municipalities and school districts. His acts as such are the acts performed in his official capacity [fol. 25] as such State officer, and hence such acts are the acts of the State of Georgia, and this action to enjoin him from assessing the value and levying the taxes on said valuations is an action against the State of Georgia, to which action the said State has not consented to be sued in this type of action. The State has provided three different methods as set out above, by which plaintiff can litigate and have determined all questions as to its alleged tax exemption.

Thirty-first Defense

Defendant shows that there is a conflict in the judgment sought to be enforced, and that of Georgia Railroad and Banking Company vs. Charles D. Redwine, recently decided in the United States. Supreme Court and pleaded as res judicata in the 5th Defense. In the two cases the pleadings, parties and the prayers were in effect identical. The plain-

tiff waived any rights it might have had to enforce the judgment now sought to be enforced when it went into the State courts on the identical issues and sought a judgment there. The judgment in the State court was diametrically opposed to the judgment now sought to be enforced holding that it was an action against the State of Georgia, and in effect holding that had the same defense been presented by Wright, Comptroller General, in the judgment now sought to be enforced, it also would have been held to have been an action against the State. The latter decision of the Supreme Court of Georgia sustained by the United States Supreme Court, supervenes and takes precedence over the judgment now sought to be enforced. The following quotation from 50 Corpus Juris Secundum, p. 15, Sec. 597, Judgments, expresses the law on this question as follows:

"Section 597. Waiver of, or Estoppel to Assert, Conclusiveness or Bar.

"A party who is entitled to claim the benefit of a former judgment may waive; or be estopped to assert, [fol. 26] the right.

"Although it has been said that, when a cause has been once fairly tried, it ought not to be tried again, even if the parties are willing, it is nevertheless a general rule that a party entitled to claim the benefit of a former judgment may waive or estop himself to assert such right. So, where a party is guilty of laches in setting up the defense of res judicata, or joins issue on the very questions settled by the judgment, or voluntarily opens an investigation of the matters which he might claim to be concluded by it, or makes an admission of record inconsistent with the former judgment, he will be held to have waived the benefit of the estoppel, and the case may be determined as though no such former judgment had been rendered."

Thirty-second Defense

The enforcement of the judgment and decree now sought of this court would be inequitable to the State of Georgia and all its taxpayers for the following reasons, to-wit:

1. The State of Georgia was not heard and its defense was not considered as to whether there was a valid contract of tax exemption.

- 2. The issue as to whether the plaintiff railroad corporation had violated its part of the contract and failed to build the railroads provided by said charter and upon which the tax exemption if any, was a consideration thereof, was not presented to nor considered by the court.
- 3. The enforcement of the judgment would be inequitable because it would deny all the property owners of the State [fol. 27] the equal protection of the laws which require all property owners to bear their share of the burden of government in that all property owners in the counties, school districts and municipalities on all the right of way of said railroad, are forced to bear more than their fair share of the expenses of government, including the cost of protection for the property of plaintiff, expenses of courts in which it litigates, the cost of schools and other improvements, all of which equal protection of the law was attempted to be provided by the vote of the people of Georgia in the Constitution of 1945 in which all tax exemptions were revoked.

Eugene Cook, Attorney General; Claude Shaw, Deputy Assistant Attorney General; Martin Peabody, Assistant Attorney General.

Duly sworn to by Charles D. Redwine. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 28] ORDER ALLOWING AMENDMENT

Within amendment hereby allowed and ordered filed subject to objections.

This 12th day of April, 1949.

Robert L. Russell, United States District Judge.

Filed Apr. 21, 1949.

00

[fol. 29] IN UNITED STATES DISTRICT COURT

Request for Admission Under Rule 36—Filed March 25, 1949

Plaintiff, Georgia Railroad & Banking Company, pursuant to Rule 36 of the Rules of Civil Procedure, requests

defendant, Charles D. Redwine, State Revenue Commissioner, within ten days after the service of this request, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1

That Exhibit A hereto attached is a true copy of the record in the Supreme Court of the United States in the case of William A. Wright, Comptroller General of Georgia, v. Georgia Railroad & Banking Company, 216 U. S. 420, including therein the record in this Honorable Court in the case of Georgia Railroad & Banking Company v. William A. Wright, Comptroller General of Georgia, No. 1192 in Equity in this Honorable Court.

[fol. 30]

2

That Exhibit B attached hereto is a true copy of the record in the Supreme Court of Georgia in the case of State of Georgia v. Georgia Railroad & Banking Company, 54 Ga. 423.

3

That the Georgia Railroad & Banking Company, between 1834 and 1845, both inclusive, constructed a main line from Augusta, Georgia, to Atlanta, Georgia, a distance of approximately 171 miles, and a branch line from Union Point, Georgia, to Athens, Georgia, a distance of approximately 39 miles, and that said construction work was performed either by the Georgia Railroad & Banking Company's own forces or by contractors working under its supervision.

Spalding, Sibley, Troutman & Kelley, Robert B. Troutman, Furman Smith, Attorneys for Plaintiff, 434 Trust Company of Georgia Building, Atlanta, Georgia.

Note: Service omitted.

[fol. 31] EXHIBIT "A" TO REQUEST FOR ADMISSION

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1909

No. 70.

WILLIAM A. WRIGHT, COMPTROLLER GENERAL OF THE STATE OF GEORGIA, the County of Wilkes, and the County of Taliaferro, Appellants,

VS

GEORGIA RAILROAD AND BANKING COMPANY

Appeal from the Circuit Court of the United States for The Northern District of Georgia

Filed February 6, 1908

(21,006)

[fol. 32] Supreme Court of the United States, October Term, 1909

No. 70

WILLIAM A. WRIGHT, COMPTROLLER GENERAL OF THE STATE OF GEORGIA; the County of Wilkes, and the County of Taliaferro, Appellants,

VS.

GEORGIA RAILROAD AND BANKING COMPANY

Appeal from the Circuit Court of the United States for The Northern District of Georgia

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[fol. 34]

No. -

WILLIAM A. WRIGHT, THE COUNTY OF WILKES, AND THE COUNTY OF TALIAFELRO, Appellants,

versus

GEORGIA RAILROAD AND BANKING COMPANY, Appellees

Appeal from the Circuit Court of the United States for the Northern District of Georgia

TRANSCRIPT OF THE RECORD

Solicitors for Appellants: John C. Hart, (Atlanta, Georgia), Attorney General of the State of Georgia. Samuel H. Sibley, (Union Point, Ga.) Hooper Alexander, (Atlanta, Georgia). Ligon Johnson, (Atlanta, Georgia). Solicitors for Appellees: Joseph B. Cumming, (Augusta, Georgia). Alex C. King, (Atlanta, Georgia).

ORIGINAL BILL

United States of America, Northeon District of Georgia:

To the Honorable the Judges of the Circuit Court of the United States for the Northern District of Georgia:

The Georgia Railroad and Banking Company, which avers itself to be a corporation created and existing under the laws of the State of Georgia with its principal office in the City of Augusta in said State, hereinafter styled Orator, brings this its Bill of Complaint against William A. Wright, a citizen of the State of Georgia, resident in the Northern District thereof, in the City of Atlanta, and thereupon Your Orator complains and says

- (1) That the several parties, Plaintiff and Defendant, are citizens and residents as hereinbefore stated.
- (2) That the matter in controversy exceeds, exclusive of interest and cost, the sum or amount of \$2,000, and arises under the Constitution of the United States.
- (3) Your Orator shows that on the 21st day of December, 1831, The Legislature of the State of Georgia passed an Act incorporating Your Orator under the name of "The Georgia Railroad Company." Thereafter, to-wit on the 18th day of December, 1835, said Legislature passed another Act, by the first section of which the name of Your Orator was changed to "The Georgia Railroad and Banking Company."
- [fol. 35] (4) By said first mentioned Act provision was made for the construction of a "Union Railroad" or "Middle Road" and three branch-railroads, from the terminus of the Union Road or Middle Road—one running to Athens, one to Eatonton and one to Madison—all of said named towns being in the State of Georgia.
- (5) It was enacted in the 15th Section of the said first mentioned Act that "the stock of said Company and its Branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads or any one of them; and after that shall be subject to a tax not exceeding one-half per cent. per annum on the net proceeds of their investments."

- (6) Your Orator shows that thereafter, to wit, December 25, 1837, said Legislature passed another Act by which your Orator should have the right to extend its Railroad from the town of Madison "to connect with and join the railroad (then) about to be constructed by the State from Tennessee line, near the Tennessee River to the Southern Bank of the Chattahoochee River." Said Act provided that for that purpose Your Orator should "have all the powers and privileges, rights and immunities in the construction of said Branch from Madison, as aforesaid, to the said State Railroad, as are contained in the several Acts heretofore passed and of force, constituting the charter" of Your Orator.
- (7) Your Orator shows that thereafter, to wit January 21, 1852, said Legislature passed an Act, authorizing and empowering your Orator and the Washington Rail or Plank Road Company to "consolidate their stock, and providing that the two Companies aforesaid, after the consolidation of their stock should be known as one corporate body, under the name and style of The Georgia Railroad and Banking Company and that said corporate body should be authorized to exercise all the powers and privileges conferred by existing laws upon The Georgia Railroad and Banking Company, and be under all the liabilities and restrictions, imposed on the same."
- (8) Your Orator shows that all of the aforesaid Acts of the Legislature are public laws of the State of Georgia.
- (9) Your Orator shows that under said Acts of the Legislature of Georgia, Your Orator constructed and equipped a main railroad from the City of Augusta to the City of Atlanta, a branch railroad from Union Point to the City of Athens and a branch railroad from a station on its main line, known as Barnett, to the town of Washington. All said localities are in the State of Georgia. The length of said Railroads is respectively: Main railroad 171 miles; Athens Branch 40 miles; Washington Branch 18 miles; Total 229 miles.
- 10. Your Orator shows that the stock of the said Company and its branches now consists of and is invested in said railroads set forth in paragraph (9) hereof, with their franchises, and their rolling stock, equipment, depots,

freight-houses, section-houses, tools and other property connected with the said railroads of Orator, except to the amount of \$44000, which is the proceeds of stock issued under an Act of the General Assembly of 1868; and that [fol. 36] the same and every part thereof are their investments, from which the net earnings are to be and are derived, one half of one per centum of which is to measure and fix the amount of taxes to be levied on and collected out of said railroads and other property, with their appurtenant and integral franchises.

Said railroads were constructed and equipped by the outlay of money, subscribed for said enterprises amounting to Four Million One hundred and fifty six thousand (\$4,156,000). Said sum was subscribed and paid by the subscribers to Your Orator and invested by Your Orator under the terms hereinafter set forth of the 15th Section of Your Orator's original Charter in said railroads, their equipment and appurtenances.

- 11. Your Orator shows that by said Fifteenth Section of Orator's Charter and Orator's action thereunder, a contract was created between the State of Georgia and Your Orator, by which the State bound itself never to impose and levy a direct tax upon the property, in which said subscriptions were invested, but to receive in lieu of all taxes and burdens on said property one half of one per cent. of the net earnings of said investments.
- 12. Your Orator shows that for Sixty three of the Seventy years of your Orator's life—Your Orator being absolutely exempt from every kind of tax during the first seven years—the State of Georgia has required of Your Orator, and Your Orator has paid, taxes, upon the theory and practice of such a contract; and said practice of the State as to Your Orator's taxes was never departed from until the passage of an Act by the Legislature, as hereinafter stated.
- 13. Your Orator shows that by the laws of the State of Georgia, Railroad Companies are required to make their annual returns for the purpose of taxation to the Comptroller General of said State, not only for the purposes of State, but also for the purposes of county and municipal taxation. That in accordance with the laws of the State of Georgia requiring from Railroad Companies annual returns to the

Comptroller General of the State of all their taxable prop-. erty as modified by Your Orator's charter, Your Orator has made returns for taxation annually, said returns have been accepted and these taxes assessed thereon paid by Your Orator and accepted by the State. These returns have shown (first) said Railroad as hereinbefore described and its equipment, valued at Four Million two hundred thousand (\$4,200,000) and (second) other property of your Orator. Said returns have claimed—and said claim has been allowed -that the said railroad and its equipment with its integral franchises, were exempt from tax, except to the extent of one-half of one per cent. on the net proceeds derived therefrom, except so far as they were the product of Forty four thousand (\$44,000) Dollars invested under an amendment to Your Orator's Charter passed October 5, 1868—which said amendment did not exempt the investments made thereunder.

- 14. Your Orator shows that such a return as is described in the next preceding paragraph of this Bill of Complaint was made to the Comptroller General for the year 1903 as for former years. A copy of said return is hereunto an-[fol. 37] nexed marked Exhibit A. But your Orator shows that Defendant William A. Wright, who is the Comptroller General of the State, refused to receive said return and demanded of Your Orator a different return, as hereinafter set forth.
- 15. Your Orator shows that on the 17th day of December, 1902, An Act was passed by the General Assembly of Georgia, and approved by the Governor of said State, entitled "An Act to provide for and require the payment of taxes on franchises, and to prescribe the method for the return and payment of said taxes", in and by which it was provided that the term "special franchise" as therein used, should include every right and privilege exercised within said State, granted to any person, partnership or corporation by said State, or its authority, or by any county, or county officer or officers, or any municipal corporation, or any officer thereof, for exercising the power of eminent domain, or for the use of any public highway or street, and every special right granted for the exercise of any public service, such as the construction or operation of railroads, and likewise for the enjoyment of many other like privileges.

Every person, partnership or corporation, holding or owning and exercising any special franchise in the State of Georgia is required to make a special return to the said Comptroller General, stating the value of said franchises as are exercised within said State, and particularly describing the same.

That by said Act, said franchises are classed as and defined to be property and are required to be taxed at the

same rate as other property.

16. Your orator shows that on said demand of the Comptroller General, Your Orator made a second return, a copy of which is hereunto annexed, marked exhibit B. But your Orator protested in making said second return, that no part of said railroad or its equipment—except as to \$44,000 as aforesaid was subject to property taxation.

- 17. Your orator shows that Your Orator has offered, and continues to offer, to pay the amount of taxes assessable against it under its Charter, to wit one half of one per cent. of the net earnings of its investments. But the Comptroller General refuses to accept said payment as a compliance by Your Orator with its legal obligation to pay taxes; but, on the contrary claims: First that Your Orator should pay a direct tax on the value of its aforesaid railroad and equipment in excess of Four Million One hundred and fifty-six thousand dollars; and Second that your Orator should pay a tax on Your Orotor's franchises. Said second claim is made under said Act of the Legislature of Georgia approved December 17, 1902, entitled "An Act To Provide for and require the payment of taxes on franchises, and to prescribe the method for the return and payment of said taxes."
- (18) But your Orator avers that it is not liable to said franchise tax or to any tax as to its said railroad and equipment, except a property tax on \$44,000 and an income tax of one half of one per cent, on its net earnings.
- (19) Your Orator shows that its railroad property, the representative of the investment of its stock, has, as an [fol. 38] inseparable and essential element constituting its chief value as the investment of its stock, the very franchise attempted to be thus separately taxed. That but for such franchises said property would be of little if any value, and of no value whatever as a railroad. That but for the element

of value derived from the franchise, the capital stock could not have been raised, it would not have been invested in the railroad property above mentioned, and no income nor proceeds, net or gross; of any kind could be derived therefrom.

Your Orator shows that an amount equal to one-half of one per centum upon the net proceeds of the said railroads and their franchises, is, by its contract with the states under which said railroads and franchises, with their equipments were invested in by the said Company, fixed as the property tax to be levied on said railroads, franchises and equipments, and that any pretended act of the legislature of Georgia assuming to levy any other sum upon any part or against any part of said property, including said franchises, impairs the obligation of the contract made by the State of Georgia with Your Orator by said Section 15 of said Act of 1833, and is contrary to the Constitution of the United States.

- (20) But your Orator shows that nevertheless the said William A. Wright, who is Comptroller General of the State of Ceorgia, acting as such Comptroller General, insists that Your Orator shall pay to the State of Georgia, to fifteen counties of said State and numerous municipalities through which Your Orator's said Railroad passes, a property tax on (\$1,990,756) Dollars, said sum representing the alleged excess in value of Your Orator's investments in its said railroad over and above the par of Your Orator's capital stock the tax thus demanded being for the year. 1903 \$20000 or other large snm
- (21) Your orator shows that said William A. Wright acting as Comptroller General as aforesaid, claims that the franchises of Your Orator should be valued outside of, and in addition to, its property at a large but as yet indefinite sum, and that Your Orator shall pay taxes on said sum, when determined, to the State of Georgia, to fifteen counties of said State and to numerous municipalities through which Your Orator's said Railroad passes.
- (22) Your Orator shows that said Comptroller General is threatening and is about to proceed, to collect said illegal taxes by levy and sale of Your Orator's property.
- (23) Your Orator shows that said purpose and attempt to/collect said taxes are illegal and void: Because the Charter

(I)

of Your Orator is a contract between Your Orator and the State of Georgia, and by said contract said State bound itself to exact no taxes from Your Orator on account of its investments in the railroad aforesaid, exceeding one half of one per cent. of the net earnings of said investments, and said taxes would be greatly in excess of one half of one per cent. of said earnings; and said threatened action of said Comptroller General and said Act of the Legislature of Georgia of December 17, 1902 would impair the obligation of said contract, and are unconstitutional, null and void under Paragraph 1 of Article 10 of the Amendments to the Constitution of the United States.

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Ifol. 39] (24) That the railroads of the state so valued are returned and their valuations are demanded by the Comptroller General at a higher value, proportioned to their market value, than is any other species of property in the State; that the taxing officers of said state require returns of all other property to be made, and accept same at a percentage of real value far below the percentages required of Your Orator and other owners of railroads in said state of Georgia, and deny to Your Orator and other owners of crailroads in this State, the equal protection of the laws, in violation of the Fourteenth Amendment of the Constitution of the United States.

25. Your Orator shows that the laws of the State of Georgia, governing the returns of property for taxation, require such returns to be made at the fair market value of said property. That such valuation of railroads in their return is required of railroad companies in making such returns, and such returns thus made do, and of necessity must, include as one element of value, the value as property and as a part of the railroad as a property, the "special franchises" as defined in said Act of 1902 above named, possessed, used or exercised in building owning or operating a railroad.

26. That the demand of said Comptroller General that Your Orator should pay taxes upon its railroad and property, to wit on the amount of four million, one hundred fifty six thousand dollars thereof, as equal to one half of one per cent. of the net proceeds of the earnings of said railroad and properties and upon the surplus of valuation of said railroad and other properties at the rate of tax levied

by the state, and also should pay a tax upon the alleged valuation fixed upon its alleged franchises as a part of its property, is, if enforced the taxation by the said state of the property of your Orator and of the same propert, twice; in this that the value of said railroads and other property upon which said taxes first herein mentioned are levied includes as a part and integral element of said railroads and other property the franchises to own, operate, use and construct the same, including the franchise of eminent domain; that without the same, the said property would be of value only as so much material, and would not be of the value mentioned in said return Exhibit B and that said valuation is not fixed upon the basis of said railroad as so much material. but is fixed upon the same as an operating, going railroad, and includes therein, as an element and part of said property, the said franchises so attempted to be separately taxed; that the laws of said state require the return of railroads for taxation, not as so much material, but as going concerns, and includes in such valuations each and every one of the franchises so required to be specially returned by the afoeesaid Act, approved December 17, 1902; that if the said Comptroller General is allowed to collect taxes on the said railroads and other property of Your Orator as specified in said return Exhibit B in accordance with the valuation therein fixed, and also to collect additional taxes upon the so-called special franchise of Your Orator, as described in said Act of the General Assembly approved December 17, 1902, Your Orator will be paying taxes twice upon the same property, to wit upon said franchises and their value; that such payment and demand will not only be contrary [fol, 40] to the Constitution of the State of Georgia, which provides that all taxation of property shall be ad valorem and uniform, but will also be in violation of the Fourteenth Amendment to the Constitution of the United States, in that it will deny Your Orator the equal protection of the laws and compel it to pay taxes twice upon the same property, whereas the other tax payers of said State are only required to pay taxes upon the same property once; that under the Constitution of the State of Georgia, no classification of property for the purpose of taxation is permitted, but all property is divided into two classesthat which is exempt from taxation, said exempted property being specified in the Constitution of said State, and

property which is not exempt; and that the property of railroads, including their franchises, together with all other property not exempt, stands in one class, and unless taxed in the same manner and to the same extent only, the owners of said railroad property and franchises are denied the equal protection of the laws.

(27) Your Orator being remediless under the rules of the Common Law and unable to obtain any relief except in a Court of Equity, to the end that the Defendant William A. Wright may, if he can, answer the several charges hereinbefore made against him, but not under oath, waives discovery from said Defendant and prays:

First. That it be adjudged that Your Orator is not liable for a property tax on its Railroad aforesaid, or any tax on its franchises; and that the only tax for which Your Orator is liable is a tax to the State only, not to exceed one half of one per cent. of the net earnings of Your Orator's investments in its railroad.

Second. That the said William A. Wright, Comptroller General, be enjoined from issuing any execution or taking any step to collect any tax from Your Orator, other than one half of one per cent of the net earnings of its investments, or any tax on Your Orator's franchises.

Third. That Your Orator may have all other and further relief that its case may require and equity can afford.

And your orator will ever pray, etc.

Jos. B. & Bryan Cumming, Complainant's Solicitors.

King, Spalding & Little, of Counsel.

(Here follow Exhibit A and Exhibit B, tax returns, marked pp. 10, and 11)

ANNUAL RETURN FOR TAXATION

x Secret Company of all property casted by said Company on the Mar. 15

pursuance of Law, without declaring the indebtedness of said Company.

Of the Georgia Railroad

1903 , made to the Comptroller-General by the President, in

\$ 34730,00 \$ 34730,00 \$ 143730,00 \$			OF FRANCHISES	VALUE OF REAL ESTATE AND ROAD BED IN THIS STATE	AGGREGATE VALUE OF WHOLE PROPERTY IN THIS STATE.	Rate in Amount State Tax,	Return of Property for	and the second of the second
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			\$54750.00	\$56000.	00	110750.001	Business Tolling and an artist and the second of the secon	
STATE OF Georgia County of Richmond Before me personally appeared. Thus. E. Scott General Manager Roughout o said Company, who, being duly sworn, deposeth and saith that the foregoing statement contains, by items, a true and				9		1,10750.001		

stated is its full market value. Sworn to and subscribed before me, this

· Before me personally appeared. Thos. K. Scott

Georgia Railroad,

1900 3, and that the value thereof as

correct return of all the property owned, controlled or held by or on behalf of said Company therein named, without deducting indebtedness of same, on the Ries: 15th March 4

Of the

Railroad Company of all property owned by said Company on the Mar 15 19 pursuance of Law, without deducting the indebtedness of said Company.

must be made on or before the first day of Mare and the Taxes thereon paid by the 20th day of becomber.

190 3 made to the Comptroller-General by the President, in

0	VALUE OF ROLLING STOCK				VALUE OF REAL ESTATE AGGREGATE VALUE OF State Tax						Return of Property for State Taxation.						
	AND ALL OTHER PERSONAL	VAI	LUE OF FR	ANCHISES	4.	ROAD BE			E PROPERTY	Rate in Mills.		State Tax,	KISD OF PROPERTY	No. of Cars. &c.	Value of Each	Total Vame	Remarks
	PROPERTY IN THIS STATE					THIS STATE	E	IN T	HIS STATE	, Milla,		54 HA 1957		1315, 47			
				(4)	\$			S .	W.				City or Town Property, lots,				
			-114	Value in t	he Sever	al Condti	14 5		*	1			Lands, Acres,			192098 4	
>			gen and		ne Sever					1			No. Miles Main Track,	227		2270000 0	4
	CAUCHTIES	Main Track Miles	VALUE	Value of Real Estate, includ- ing Depots, &c.	Vulue of Bridges	Total Value of Track and Real Estate	Property located in countr	Provata Velu- Personal Prop- erty in county	Value Bra Estate unt used for R. R. Purposes	Aige m. A.	in County	numly County Rates Tax	Su. Miles Side Track,	62	-	486000 0	
		4	•	1		•	•	•				1 1	No. Bridges.	19	- 5.7	75/200 0	
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and the second	Columbus McTuffie	16.7				B.			none	11/			No. Depois and other Buildings,	242		141650 0	9
		16.					1600		300.00				Water Tanks, Pumps, Stationary Engines, World-Sheds, Saws Coal Structures, within this State.	25		10000 0	1
	do	8:7	•				7						Value of Wharfs Docks, Warehouses, etc.,				
	Taliaferro Main line	12.7				A.74			150.od		1111		Locomotives for Passenger Service.				1
	Greene Athens Br.	6.9						-	950.00				Locomotives for Switching Service,	49	5000 00	21:5000 0	
		25.2							700.00		· c		Locomother for Construction Service,	.6	3000		ineres of
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		1 4											Sleeping Care, Condemned	5	800 00	4000 00	34
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		25.1				*			none				· Haggage, Mail and Express Cars (combined),	10	F.	120	<u> </u>
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8				•	•	5	• ,	•			344		Coal, Stone or Ore Cars (8 wheels),	50	600 od	30000 0	S
	Augusta	1.868									1.		Coal, Stope or Ore Care (4 wheels),	217	25000	54250 0).
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	wasning ton	1.326		9-			9			25.00			Repair Care (push). 🐇	0			
	Crawfordville Union Point	1.			A. A.	0			950.00	0			Repair Cars (lever and crank),	0			
	Crawford	.681				1				Y			Malo Seas Care, Shanty	23	100 00	230000	
	Athens Greensboro	1.64 .458					- 0 ta.,		4900.00				Kananaka Cara furnigure	0	400 00	- 2000	
	Buckhead Madison	1.05							500 0		7 - 3-1-10		Stram Shovel Cara,	3	100 00	300 0	
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	Rutledge Social Circle	1.98											Gravel or Dunip Cars.	0	0		
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-	Stone Wountain	1.216		A			/						Number Stocks and Souds of corporations of this and other State- oward by the Company, whether in c out of the State of the			1716040 0	
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	Atlanta	. 95		1		1/	14.	•	44500.00	1	4		Cash on hand and Amounts due from other Hoads,			325642 3	
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	TUTALS.		manage of the same	100		7		A Second	\$54750.do	, to						The sale of the sa	

STATE OF

County of

Before me personally appeared President of said Company, who, being duly sworn, deposeth and saith that the foregoing statement contains, by items, a true and correct return of all the property owned, controlled or held by or on behalf of said Company therein named without deducting indebtedness of same, on the First 190 , and that the value thereof as stated is its full market value.

Sworn to and subscribed before me, this

President of

The Georgia Railroad & Banking Company in making the within Return protests:

- (1) That all its investments in railroad property on its
 Railroad from Augusta to Atlanta and at those places, and on its branch
 line from Barnett to Washington, and on its branch line from Union Point
 to Athens; and in property used in the operation of said railroad and
 said branch lines are covered by its original charter, granted December
 23, 1833, and amendments thereof, made prior to January 1, 1863, without
 reference to the value of said investments; that said investments are
 not liable for a property tax; and that as to them said corporation is
 liable only for a taxof one half of one per cent on their net earnings.
- (2) That it is not liable to pay a tax on \$15,542.88 of "Dividends not paid out" or any part thereof, for the reason that said amount and every part thereof is an indectness of the corporation to its stockholders, and no part thereof is taxable assets of the corporation.
- "Stocks and Ronas owned by the Company" or any part thereof except
 "\$31,000 Walton Railroad Company's bonds and \$25,000 Bills receivable—
 the balance \$1,660.040 consisting of shares of the stock of the following comprises to wit; Georgia Railroad Bank, The Atlanta and West Point
 Railroad Company and The Western Railway of Alabama- none of said shares being taxable under the laws of this State.
- (4) That the sum \$325.642.31 or any part thereof is not subject to tax- all of said sum being net earnings, on which a tax of one half of one per cent is paid in accordance with this protestant's charter.

And The Georgia Railroad and Banking Company soleminly protests that all the within Return and every part thereof is made for the
purpose of furnishing the office of the Controller General with information, sought by said office, and not for the purpose of making
a "return of Property for State Taxation."

The Georgia Railroad and Banking Company.

by Jacob Phinizy, President.

TAX RETURN

RAILROAD COMPANY,

Tax must be paid Treasurer of the State on or before December 20th, 190____

FILED IN OFFICE

this _____ day of _____ 190_

WM. A. WRIGHT, Comptroller-General.

Recorded Folio

Records of 190

Value of Property, \$_____

Tax,

[fol. 44] STATE OF GEORGIA, RICHMOND COUNTY:

You Jacob Phinizy do swear that you are the President of The Georgia Railroad and Banking Company; and that the matters and things in the foregoing Bill stated are true of your own knowledge, except where stated upon information and belief, and that these you verily believe to be true.

Jacob Phinizy.

Sworn to and subscribed before me this 6th day of January 1904. Geo. K. Calvin, U. S. Commissioner for Southern District of Georgia.

FILING

Original Bill Filed in Clerk's Office January 7th, 1904 O. C. Fuller, Clerk.

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

In Equity. #1192

THE GEORGIA RAILROAD AND BANKING COMPANY

WM. A. WRIGHT

Upon considering the bill of complaint in the above stated case, it is ordered that the defendant therein named, Wm. A. Wright, do show cause before me on Saturday the 30th day of January, 1904, at ten o'clock a.m. or so soon thereafter as counsel can be heard, at the United States Court House in the City of Atlanta, Georgia, why the injunction prayed for therein should not be granted; and in the meantime, until the further order of the Court, the said defendant, Wm. A. Wright, is restrained as prayed for in said bill.

Let the said defendant be served with subpoena and a copy of this order at least 15 days before the hearing.

This 7th day of January, 1904.

Wm. T. Newman, U. S. Judge.

Filed in Clerk's Office 7 day of Jan'y 1904.

O. C. Fuller, Clerk, By J. D. Steward, Deputy.

[fol. 45] UNITED STATES OF AMERICA,
Northern District of Georgia:

In Equity

THE GEORGIA RAILWAY & BANKING COMPANY, Complainant,

and

WILLIAM A. WRIGHT, Defendant

The Rresident of the United States to William A. Wright:

For certain causes offered before the Judges of the Circuit Court of the United States for the Northern District of Georgia, in Equity, you are hereby commanded and strictly enjoined, that, laying all other matters aside, and notwithstanding any other excuse, you personally be and appear at the Clerk's office of the said Court, in the City of Atlanta, at Rules to be had on the first Monday in February 1904 next, to answer to those things which shall then and there be objected to you by the Bill of Complaint of the Georgia Railway and Banking Company and to do further, and receive what the said Court shall have considered in this behalf, and this you may in no wise omit, under penalty of Five Hundred Dollars; and have here this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 9th day of January in the year of our Lord, One Thousand Nine Hundred and four.

[Seal U. S. Circuit Court, Northern District of Georgia]
O. C. Fuller, Clerk.

Memorandum.—The Defendant is required to enter his appearance in the suit above stated, in the Clerk's Office, on or before the day at which this Writ of Subpæna is returnable, otherwise the Bill may be taken pro confesso.

O. C. Fuller, Clerk.

[Endorsed:] No. 1192. In Equity. In the Circuit Court of the United States for the Northern District of Georgia. February Rules, 1904. In Equity. The Georgia Railroad and Banking Co., Complainant, and William A. Wright, Defendant. Subpæna. Returned into Clerk's Office, and filed January 9th, 1904. O. C. Fuller, Clerk. Jos. B. & Pryan Cumming, King, Spaking & Little, Complainant's Solicitor.

I Certify that I served the within Writ of Subposes on the parties at the places, time, and in manner stated.

Name of person served. How served. When served. Where served.

Service of Subpæna and all further service waived, copy subpæna and order received.

This January 9th, 1904.

William A. Wright, By Jno. C. Hart, Att'y at Law & Attorney, General for Georgia.

The return of — — Marshal, this — day of ——

By --- , Deputy.

Marshal's Costs, \$-

[fol. 46] Exceptions of Wm. A. Wright

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

No. -. In Equity

GEORGIA RAILROAD & BANKING COMPANY

VS.

WM. A. WRIGHT

Exceptions Filed by the Defendant to the Original Bill .
Filed in this Cause by Plaintiff for Irrelevancy

Now comes Wm. A. Wright, the defendant in the above stated cause and excepts to all of paragraph 24 of complainant's bill and for cause of exception says,

- 1. The Constitution and laws of the State require that all property shall be taxed ad valorem and uniform. The laws of the State treat alike, for the purpose of taxation, railroad property and all other species of property. The mal-administration of a valid State law makes no Federal question. No law can be held un-constitutional unless it conflicts with the constitution.
- 2. In this case the taxes sought to be collected are upon the return made by the complainant itself, and while it

protests against its liability to taxation, by reason of the provision in its charter, no question is raised that the values placed upon the property sought to be taxed are beyond their true market value.

- 3. Complainant will not be heard to set up in a court of equity that other species of property has been returned, or accepted, for taxation, at a percentage of value lower than it offers to return its property for taxation, without first having tendered at least the taxes due by it at the valuation fixed upon other species of property.
- 4. Return of property in this State is made primarily by the property owner, or in case of corporations, by the representative of such corporation. In case of railroads the property is returned to the Comptroller General. In case of other species of property, to the tax receivers of the State. In case of disagreement between the owners or representative of the property to be taxed and the taxing officer, it is provided that the ultimate fixing of value is by arbitration and by arbitrators selected by the parties at interest. It will be noted therefore that the allegations in paragraph 24 are misleading and are not founded upon either law or fact, and are not pertinent or relevant to the issue, and present no Federal question.

Therefore this exceptant excepts to that portion of the bill as impertinent and humbly insists that that portion ought to be expunged therefrom

Jno. C. Hart, Counsel for Defendant.

[fol. 47] UNITED STATES OF AMERICA, Northern District of Georgia, County of Fulton:

Wm. A. Wright makes solemn oath and says that he is the above named defendant and that the foregoing exception is not interposed for delay and that the same is true in point of fact.

Wm. A. Wright, Defendant.

Subcribed and sworn to before me this 3 day of March, 1904; W. H. Harrison, N. P., Fulton Co., Ga.

I hereby certify that in my opinion the foregoing exception is well founded in point of law.

Jno. C. Hart, Counsel for Defendant.

Filed in Clerk's Office 12 day of May, 1904. O. C. Fuller, Clerk, By J. D. Steward, Deputy.

PLEA OF WM. A. WRIGHT

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

No. -. In Equity

GEORGIA RAILEOAD & BANKING COMPANY

VS.

WM. A. WRIGHT

Plea of Wm. A. Wright, the Above Named Defendant

This defendant by protestation, not confessing or acknowledging all or any of the matters and things in said bill to be true in such manner and form as same are therein set forth and alleged, pleads to said bill as follows; to wit.

- 1. That the charter by said bill specified and as in said bill shown, is a charter granted by the Legislature of the State of Georgia by an Act of December 31st, 1833, and is a statute and part of the general law of the State of Georgia.
- 2. At the February Term, 1879, of the Supreme Court of Georgia in the case of Goldsmith, Comptroller General vs. Georgia Railroad Company, and the Georgia Railroad Company vs. Goldsmith, Comptroller General, reported in the 62 Ga. p. 485 et seq. the Supreme Court construed said charter and statute of the State of Georgia, particularly the section by complainant in this bill sought to be plead as an exemption to the tax levy complained of:
 - 3. That by said decision the Court declared the true construction of said charter and statute, and the proper mode of taxation thereunder, to be as follows; [fol. 48] "2. The limit on the taxing power extends to all the capital of said company, except so much thereof as was issued under the amendment of 1868 authorizing the Clayton branch. 54 Ga., 423. The correct mode of taxing the company's property under existing laws is to estimate all its property at its true value, just as if it belonged to a natural person, and upon so much of this value as equals the amount of the whole capital stock other than that issued for the Clayton branch, assess at the charter rate, (that is at such per centage as will yield a revenue to the State equal to

one-half of one per cent on the net annual proceeds of all the company's investments); and upon the balance of such value, if any, assess at the general rate. If, however, the charter rate thus arrived at should exceed the general rate, then assess at the latter con the whole value, as in no case is the general rate, this is, the rate ad valorem imposed upon property generally, to be exceeded."

4. That said decision is the true, proper, legal construction of the said charter, is between the same parties and involves the question now raised by complainant, and said judgment will be observed by, and is binding upon, this Honorable Court.

5. That said levy sought to be enjoined is in strict accord with the construction of said charter, the tax exemptions thereunder and the findings, terms and conditions of said decision and the laws of the State of Georgia, and in there-

fore a legal and proper levy.

All of which matters to and things this defendant avers to be true and pleads res judicata to said bill and prays judgment of this Honorable Court whether he should be compelled to make any other or further answer to said bill, and prays to be hence dismissed with its costs and charges in this behalf wrongfully sustained.

Jno. C. Hart, Counsel for Defendant.

UNITED STATES OF AMERICA, Northern District of Georgia, County of Fulton:

And Wm. A. Wright makes solemn oath and says that he is the above named defendant and that the foregoing plea is not interposed for delay and that the same is true in point of fact.

Wm. A. Wright, Defendant.

Subscribed and sworn to before me this 3 day of February, 1994. W. H. Harrison, N. P., Fulton Co., Ga.

I certify that in my opinion the foregoing plea is well founded in point of law.

Jno. C. Hart, Counsel for Defendant.

Filed in Clerk's Office 12 day of May, 1904.
O. C. Fuller, Clerk, by J. D. Steward, Deputy.

[fol. 49], Demurrer of Wm. A. Wright

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

No. -. In Equity

GEORGIA RAILROAD & BANKING COMPANY

VS.

WM A. WRIGHT

Demurrer of Wm. A. Wright, Defendant Above Named

This defendant by protestation, not confessing or acknowledging all or any of the matters or things in said bill to be true in such manner and form as same are therein set forth and alleged, demurs to said bill as follows; to-wit:

- 1. Said bill upon its face shows the same to be a suit between a citizen of the State of Georgia and said State or a citizen thereof and no federal question is presented by said bill.
- 2. It appears from plaintiff's own showing by said bill that it is not entitled to the relief prayed against defendant.
- 3. Defendant specially demurs to paragraph 23 in the original bill of complaint in which paragraph it is alleged the charter of complainant is a contract between it and the State in which the State bound itself to exact no taxes from complainant in excess of one-half of one per cent of the net earnings of complainant, and for cause of demurrer says,

The Act of December 17th, 1902, passed by the General Assembly of the State of Georgia and entitled "An Act to provide for and require the payment of taxes on franchises and the prescribe the method for the return and payment of said taxes" does not, as claimed by complainant impair the obligation of the contract set forth in complainant's charter in violation of Article 1, Section 10, paragraph 1 of the Constitution of the United States, for by the charter of complainant the limitation of the tax rate applied to the original investment represented by stock in said company and that the franchise of said company is not within the property protected.

4. Defendant demurs to paragraph 11 of complainant's bill in which paragraph complainant avers that a contract

was created between the State of Georgia and complainant by the 15th Section of complainant's charter by which contract the State bound itself never to impose and levy a direct tax upon the property in which said subscriptions were invested but to receive in lieu of all taxes and burdens on said property one-half of one per cent of the net earnings of said

investment and for cause of demurrer says,

That the provision aforesaid is a covenant between the State and the stockholder that it would never levy a tax on the original investment in said railroad company in excess [fol. 50] of one-half of one per cent of the net investments thereof, but that the State did not contract to commute the tax rate upon the property of complainant in excess of the original investment and that the surplus which it was seeking to tax at the general rate is not protected under the contract as claimed by complainant and that said excess of property which represents accumulated profits, surplus and subsequent investments is not protected by said contract.

Wherefore and for divers other good causes of demurrer appearing in said bill this defendant demurs thereto and humbly demands judgment of this Court whether he should be compelled to make further answer to said bill or to the parts of said bill demurred to as aforesaid, and prays to be hence dismissed with its costs and charges in this behalf

wrongfully sustained.

Jno. C. Hart, Counsel for Defendant.

United States of America, Northern District of Georgia, County of Fulton:

Wm. A. Wright makes solemn oath and says that he is the above named defendant and that the foregoing demurrer is not interposed for delay and that the same is true in point of fact.

Wm. A. Wright, Defendant.

Subscribed and sworn to before me this 3 day of February, 1904.

W. H. Harrison, N. P. Fulton Co., Ga. that in my opinion the foregoing de-

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

Jno. C. Hart, Counsel for Defendant.

Filed in Clerk's Office 12 day of May, 1904.
O. C. Fuller, Clerk, by J. D. Steward, Deputy.

Amendment to Bill

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

In Equity

THE GEORGIA RAILROAD AND BANKING COMPANY

VR.

WILLIAM A: WRIGHT, Comptroller General

Complainant by leave of the Court amends its bill of complaint in this case, by adding thereto a new paragraph to be known as Paragraph 12½ and to come just after paragraph

12, and before paragraph 13 thereof.

This complainant avers that it is res judicata between your Orator and said State of Georgia, that said Section 15 [fol. 51] of the charter aforesaid constituted a contract exempting from taxation its railroad, equipment, franchises and appurtenances as the investment of its stock, except to the extent of said one-half of one per centum per annum on said net income.

Said State of Georgia in the year 1875 undertook to collect taxes upon the said railroad equipment, franchises and appurtenances, by levying thereon and collecting therefrom taxes as against other railroad companies having no charter provisions, governing taxation, under the Act of 1874 for the taxation of Railroads. Said State through its Compa troller General issued an execution for the collection of such taxes so claimed. Said execution was arrested by the making of an affidavit of illegality as prescribed by law for trying the issue of said legality of said tax, the same being brought to, and returnable to the Superior Court of Fulton County, Georgia. Said case was duly tried in said Court, the issue being that by reason of said Section 15 of Orator's charter this complainant was not subject to be so taxed. Said Court adjudged that said Section of said charter relieved said complainant from liability to said tax, and that under said section it could not be taxed except as to the investment of its stock subscribed under an amendment to its charter passed by the General Assembly of Georgia in the year 1868 for building what was called the Clayton-Branch, and final judgment was entered accordingly. Said

case was appealed by said State to the Supreme Court of Georgia, where said judgment was in all things affirmed.

No other final judgment has ever been had construing your Orator's exemption from, or contract governing, taxation. Said judgment adjudges that said contract is one regulating the liability of the corporation, your Orator, to taxation upon its property, and not the liability to taxation of its shareholders, and also that the same exempts its railroads, franchises, equipment and appurtenances, except the investment made under said Act of 1868.

Complainant offers to produce the record of said cause and judgment, and says that the same is res judicata as

Jos. B. Cumming, Bryan Cumming, Complainant's Solicitors.

King, Spalding & Little, of Counsel.

Order Allowing Amendment

This amendment is allowed and ordered filed. This May 13th, 1904.

Wm. T. Newman, U. S. Judge.

Filed in Clerk's Office May 13th, 1904.
O. C. Fuller, Clerk, by J. C. Moore, Deputy.

[fol. 52]

Opinion of the Court

IN THE CIRCUIT COURT OF THE UNFIED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

GEORGIA RAILBOAD & BANKING COMPANY .

VS.

WILLIAM A. WRIGHT, Comptroller General .

OPINION

This is a bill brought by the complainant corporation against the defendant Wm. A. Wright, Comptroller General of the State of Georgia, seeking an injunction against what the company claims is an illegal effort to tax it, and to have a decree adjudging that it is not liable for a property

tax on its railroad, or any tax on its franchise, and that the only tax for which it is liable is a tax to the State of one-half of one percent on the net earnings of its investments.

The defendant has interposed demurrers and pleas, and the complainant, by an amendment, the plea of res judicata, all of which, however, put in issue and bring before the court clearly, certain specific questions as to the liability of the complainant company for taxation by the state of Georgia, which will be hereafter referred to.

The Georgia Railroad & Banking Company was incorporated originally under the name of the Georgia Railroad Company, by an act passed by the legislature of Georgia approved December 21st, 1838. The provision of the act material here, and which is for construction, is a part of the fifteenth section, as follows: 'The stock of said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads or any one of them: and after that, shall be subject to a tax not exceeding one-half per cent per annum on the net proceeds of their investments.'

The State has for sixty years or more allowed the company to return its net earnings and pay a tax thereon of one-half of one per cent, without objection, so far as shown here, except (as will be hereafter referred to) the effort to impose a property tax under the act of 1874.

The issues presented are: (1). Does the word "stock" as used in this taxing clause in the company's charter refer to stock in the aggregate in the hands of the company, (its capital stock) or does it refer to stock in the hands of the shareholders? (2) Is the decision of the supreme court of Georgia rendered in 1874 on the right to tax this corporation, res judicata in this case! and (3) Is this company subject to a tax cn its franchise under the Franchise Tax Act of the legislature of Georgia of 1902 in view of the taxing clause in its charter! Other minor questions are raised, but the foregoing are the main and important ones.

[fol.53] The distinguished Attorney General, representing the Comptroller General, contends that the word "stock" in the clause under consideration refers to stock in the hands of the shareholders, as distinguished from the entire capital stock of the company; and he concedes that the case very largely depends upon the soundness of his contention in this respect. He has urged with much force both

in the oral argument and in the brief he has handed in, this view of the proper meaning of the taxing clause of the charter of the complainant company, which has been quoted above.

It may be remarked in the first place, that so far as this record shows, or so far as the reported cases show, no effort has ever been made on the part of the State or its officers to treat the scheme of taxation provided for in this clause of the Georgia Railroad Company's charter, as referring to shareholders. The tax has always been imposed upon the net earnings of the company, the State treating the word "stock" therefore, necessarily as meaning the capital stock in the hands of the company, and not the separate shares of stock in the hands of the shareholders. This course of procedure by the officials of the State has been justified by the decisions of the supreme court of the State.

In the case of City Council of Augusta v. Georgia Railroad & Banking Company, 26 Ga., 651, the language used by the court in the opinion, clearly indicates that such is its view of the meaning of the word "stock." This is from the opinion:

"We think, that this part of the charter means, secondly, that the stock of the company, as stock; as a unit; is alone what is to be subject to the tax;" etc. And this further expression: "We think, then, that the stock employed in banking, is to be considered as included in the expression, the stock of the company: and therefore, that it, also is entitled to the exemption."

In the opinion of the court in State of Georgia v. Georgia Railroad & Banking Company, 54 Ga., 423, the language "that its tax shall not exceed one-half per cent. on its earnings" is manifestly to the same effect.

These expressions used by the Supreme Court in the decisions named, show beyond question that the court considered the term "stock" as referring to stock in the aggregate in the hands of the company.

In Ordinary of Bibb County v. Central Railroad & Banking Co., 40 Ga., 646, 650, Judge Warner speaks of stock of a corporation in this way. "What is the 'stock' of said railroad companies? Bouvier defines stock to be, 'the capital of corporations; this is usually divided into shares of a definite value, as one hundred dollars, fifty dollars per share."

2d Bouvier's Law Dictionary, 531. The stock of these companies then consists of their capital invested in such property as may be necessary and proper for conducting the business for which they were chartered. All the property of these companies that is necessary and proper, for the purpose of laying, building and sustaining their respective railroads, constitutes a part of the capital stock of said companies, and is not liable to be taxed in any other manner than is specified in their respective charters.

[fol. 54] It is further urged that the use of the pronoun "their" preceding the word "investments" indicates that the reference in the clause is to shareholders who should become interested in this enterprise, and not to the corporation. The opposing contention is that it is used in the same sense as if the pronoun "its" had been used instead of "their".

An examination of this act shows the latter contention to be true, beyond question. The first section of the act has this language; "The company provided for in this Act and herein more especially incorporated and authorized shall and may direct and confine their first efforts" etc. In the third section, these two expressions are used: "The said company shall be at liberty to enlarge their capital", and "books for enlarging their capital" etc. And also in the same section: "so as to make their capital adequate" etc. And also this: "It shall be lawful for the company from time to time to invest so much of said parts of their capital or of their profits" etc. In section 9 this occurs: "The aforesaid company", by their corporate name aforesaid may sue" etc.

And in section 10: "The said Georgia Railroad Company shall have power and capacity to purchase and have and hold in fee simple or for years to them and their successors" etc.

In other instances the pronouns "their," "they" and "them" are used in referring to the company.

The language of the clause itself indicates that the word "their" relates to the company, and not to the stockholders separately. Reference would hardly be made to what the stockholder gets by way of a dividend, as the "net" proceeds of his investment. The use of the word "net" indicates that something is being deducted. It could only refer to the company, which deducts its expenses, and has clear,

over and above all outlay, a certain amount, which is the net proceeds in its hands on the investment.

In addition to this, the supreme court of the State in State of Georgia v. Georgia Railroad & Banking Company, supra. clearly treats the word "their" as having this meaning, when the tax provided for in this clause is spoken of as a tax,

"on its earnings," etc.

There can be no reasonable doubt, therefore, considering this entire clause, that it refers to the capital stock of the company, and that it was the intention of these early lawmakers that the company should pay the State, after seven years from the completion of the road, one-half of one per cent, on its net earnings. There was nothing remarkable about this provision, when we considered the time and conditions. In 1833 railroad building was in its infancy. No one could tell whether this project would be successful, or not. It was experimental. Those who put in their capital might, (so far as could then be seen) suffer complete loss. What was more natural than that the legislature should allow a very moderate scheme of taxation for such an enterprise?

In 1874 an act was passed by the legislature of Georgia, entitled "An Act to amend the tax laws of this State, so far as the same relate to railroad companies and to define the liability of such companies to taxation, and to repeal so [fol. 55] much of the charters of such companies, respectively, as may conflict with the provisions of this Act." In the body of the act was provided that "the presidents of all the railroad companies in this State-shall be required to return, on oath, annually to the Comptroller General, the value of the property of their respective companies without deducting their indebtedness; each class or species of property to be separately named and valued, so far as the same may be practicable, to be taxed as other property of

the people of the State."

Under this act an effort was made to tax the Georgia Railroad & Banking Company; the matter was carried into the courts, and determined in favor of the railroad company by the Superior Court of Fulton County. The case was taken by the State to the Supreme Court and by that court the judgment of the court below was affirmed. State of Georgia v. Georgia Railroad & Banking Co., supra.

The decision in that case is a comprehensive one. So much of the opinion by Judge McCay as is material here is as follows:

"As the Supreme Court of the United States is a court of appeals from this court, on a question of this character, I feel bound to conform myself to its decision, although, I feel it to be my duty to what I deem the truth, to express my dissent from the conclusions at which it has arrived. On the authority of these decisions, we therefore decide that it is competent for the general assembly to contract in the charter of a corporation, that it shall be exempt from taxation, or, as in the charter of the Georgia Railroad Company, that its tax shall not exceed one-half of one per cent. on its earnings, and that having so contracted, without reservation, it is not competent for a subsequent legislature to violate the obligation of that contract by assessing a higher tax. Nor has there been any legislation accepted by the company since the adoption of the Code which puts this corporation on a footing with the Central and Southwestern Roads, so as that the terms by which it holds its franchises and exemption is a charter granted since the Code and therefore capable of being withdrawn."

This decision is pleaded by the complament here by an amendment to the bill as res judicata, and I think it must be so regarded. It is distinctly held that the tax of the Georgia Railroad & Banking Company shall not exceed "one-half of one per cent. on its earnings;" that this is a contract with the state, and that it is not competent for any subsequent legislature to violate the obligation of this contract by assessing a higher tax. That is what is attempted here, and the decision named clearly holds that this cannot be done. It is a decision, in my judgment, of the same question now before the court, and between the same parties.

In Southern Pacific Railroad v. United States, 168 U. S. 1-48, the rule in reference to res judicata is stated as follows:

"The general principle announced in numerous cases is that the right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, office and issuing the executions upon said branch railroad and the property held in connection therewith, to which intervenor is entitled. Intervenor has applied to said comptroller defendant in original bill, for its proper certificate and tax executions against complainant and said property embraced by said branch railroad for the years from 1897 to date inclusive, which defendant under the restraining order heretofore set forth declined and still declines to do, said defendant asserting that under said order he is forbidden to issue any executions whatsoever in the premises.

XIV. By reason of said injunction and restraining order intervenor is denied its taxes, its tax execution and the collection of its taxes now due by complainant and outstanding against said branch railroad.

Wherefore intervenor prays that said order be revoked or so modified as to permit the defendant in original will to issue to intervenor the tax executions and certificates as hereinbefore set forth, that said defendant be authorized to issue same, that intervenor be no longer hindered in any manner in the collection or enforcement of its taxes under the suit herein and for such other and further relief as may to the court seem meet and proper.

And your intervenor will ever pray.

F. H. Collier, Ligon Johnson, Wm. Wynne, Att'ys for Intervenor.

STATE OF GEORGIA, County of Wilkes:

D. S. Standard being duly sworn on oath says that he is Commissioner of Road- & Revenues of Wilkes county, intervenor in the foregoing and hereinbefore styled cause; that he has read the foregoing intervention and that same is true of his own knowledge except as to matters stated [fol. 64] upon information and belief and those he believes to be true.

D. S. Standard, C. R. & R.

Sworn to and subscribed before me this 9th day of March 1906. F. W. Gilbert, Notary Public, Wilkes Co., Ga.

OEDER

Let the intervention be filed without predujice and served upon the Georgia Railroad & Banking Co. by their solicitor of record.

This March 14th, 1906.

Wm. T. Newman, U. S. Judge.

Filed in Clerk's office March 14th, 1906. O. C. Fuller, Clerk.

SERVICE

Served copy of foregoing intervention upon Alex C. King, of King, Spalding & Little this 19th day of March, 1906, they being solicitors of record for the Georgia Railroad & Banking Co.

Ligon Johnson.

DEMURRER OF WILKES COUNTY, GEORGIA

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTH-ERN DISTRICT OF GEORGIA

No. 1192. In Equity

GEORGIA RAILROAD & BANKING COMPANY

VS

WM. A. WRIGHT et al.

Now comes the defendant Wilkes County Ga. by leave of the Court and hereby adopts the demurrers and pleas herein of file of the defendant, Wm. A. Wright, as its own and as fully and completely as if the same were specified, reiterated and filed in exact words.

F. H. Collier, Wm. Wynne, Ligon Johnson, Attoney- for Wilkes County, Ga.

Filed in Clerk's Office 3rd day of July 1907. O. C. Fuller, Clerk, By J. D. Steward, Deputy Clerk.

[fol. 65] Answer of Wilkes County, Georgia

In the Circuit Court of the United States for the Northern District of Georgia

No. 1192. In Equity

GEORGIA R. R. & BKG. Co.

VS.

WM. A. WRIGHT et al.

Comes Wilkes County Ga. defendant herein by leave of the Court, its demurrer and pleas herein having been overruled, and files its foregoing petition of intervention herein as its answer in this case.

F. H. Collier, Wm. Wynne, Ligon Johnson, Att'ys for Def't Wilkes Co. Ga.

Filed in Clerk's Office 3rd day of July 1907. O. C. Fuller, Clerk, by J. D. Steward, Deputy.

INTERVENTION OF TALIAFERRO Co., GEORGIA

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTH-ERN DISTRICT OF GEORGIA

No. 1192. In Equity

GEORGIA RAILROAD & BANKING CO.

VS.

WM. A. WRIGHT; TALIAFERRO COUNTY, GEORGIA, Intervenor

Comes the county of Taliaferro and leave of the Court to intervene in the above numbered and entitled cause being first had and obtained, files this its intervention therein, and thereupon petitioner shows:

To the Judges of the Circuit Court of the United States, for the Northern District of Georgia, sitting in equity.

I. Intervenor is a duly constituted and qualified county of the State of Georgia, the complainant a corporation and

citizen of Georgia and the defendant a citizen of Georgia and resident of the northern district thereof.

II. Intervenor, as such county as aforesaid, is entitled to its proper, uniform and ad valorem tax upon all property within its confines.

III. Among the property so subject to its tax is the branch railroad from the town of Barnett upon the main line of [fol. 66] the Georgia Railroad, to the county line of Wilkes County, into which county and to the town of Washington said branch railroad extends, the said branch railroad being the property of complainant in original bill.

IV. The said complainant has heretofore refused and still refuses to return for taxation or pay any tax whatever upon said branch railroad.

V. Complainant in original bill is due intervenor its taxes upon said road from and for the year 1897 up to the present time. These taxes complainant has refused and still refuses to pay, claiming to base its refusal upon an alleged tax exemption under the charter of said complainant. Intervenor asserts that no exemption whatsoever now exists or has ever existed as to said branch railroad or any stock or property owned, held or connected ther-with under any act chartering or authorizing said road, nor is same in any manner exempted under the charter of complainant in original bill or under the laws of the State of Georgia, but avers on the contrary, the statutes and laws of the State of Georgia now declare and have at all times declared said railroad to be taxable in the same manner and to the same extent as other property within said county.

VI. Intervenor further avers that the charter amendment of complainant in original bill (Acts of Georgia 1849-50, page 239) under which complainant was vested with what legal authority in connection with said branch road, declared in terms that no exemption should exist in connection with the taxation thereof; that under the subsequent act also authorizing the Washington Rail and Plank Road Company to construct said road (Acts of Georgia 1850, page 219), no exemption was given.

Said road was authorized and constructed under the authority of said acts and said acts alone, and it was there-

under and under all subsequent laws of Georgia subject to taxation like other property within said county.

VII. Intervenor asserts that had said branch road been exempt under prior acts, which intervenor here denies, the consolidation of such branch road and the Washington Rail and Plank Road Company with complainant, under complainant's charter and the act authorizing such consolidation (Acts of Georgia 1851-2; page 120) specially revoked any previous exemption which said branch road or the complainant or others may have theretofore asserted or claimed. The charter amendment heretofore specified of complainant in original bill together with said act authorizing consolidation denv any and all exemption from taxation to complainant in original bill so far as said branch railroad and any and all stock issued or property owned or held in connection therewith. Said branch road was consolidated with complainant in original bill and acquired, held and operated by it only under and by virtue of said acts.

VIII. Intervenor further avers that any exemption which may have existed under the charter and amendments of complainants, which exemptions intervenor asserts do not now nor have they ever applied to said branch railroad, were only for the terms of thirty six years from the completion of the main line of said complainant from Augusta [fol. 67] to the point in said charter specified, which road was so completed about the year 1845, that is to say from the years 1846 to 1882, inclusive, and that since the year 1882 no exemption what soever has existed under the charter of complainant in original bill.

IX. Intervenor further submits that the right to exclusive use by complainant of said Georgia railroad and roadway was only for the period in the preceding paragraph specified, that is until the year 1882, the State of Georgia and the counties through which said road runs having concurrent rights to said road and the use thereof; that said complainant can and has exercised exclusive use of said railroad only under such terms and conditions as the state of Georgia and said counties may have fixed and particularly with reference to the taxes levied or permitted under the general law of the State of Georgia.

X. On the — day of January 1904, complainant filed its bill herein for injunction against the defendant, seeking to restrain the defendant in the issuance of any tax executions based upon the assessment under the act of the legislature of Georgia, commonly known as the 'franchise tax act' and further to restrain the defendant from issuing any tax executions or fi. fa.'s, whatsoever against said complainant, and whereupon this honorable court passed the following order:

"Upon considering the bill of complaint in the above stated cause, it is ordered that the defendant therein named, Wm. A. Wright, do show cause before me on Saturday the 30th day of January, 1904, at ten o'clock a. m. or so soon thereafter as counsel can be heard, at the United States Court House in the city of Atlanta Georgia, why the injunction prayed for thereunder should not be granted; and in the mean time until the further order of the court the said defendant Wm. A. Wright is restrained as prayed for in said bill"

which restraining order is still outstanding in full force and effect and said defendant thereunder enjoined from issuing the executions to which intervenor is entitled.

XI. The tax executions upon railroad property in the state of Georgia are and must be, as required by law, issued by the Comptroller of the state and by him delivered to the several counties entitled to the same, including executions said ranch railroad and property of said complainant to which intervenor is entitled.

XII. The defendant in original bill is Comptroller of the State of Georgia and the said injunction and restraining order prevent his exercising the functions of his said office and issuing the executions upon said branch railroad and property held in connection therewith to which intervenor is entitled. Intervenor has applied to said Comptroller, defendant in original bill, for its proper certificate and tax execution against complainant and said property embraced by said branch railroad as aforesaid for the years from 1897 to date, inclusive, which defendant under the restraining order heretofore set forth refused and still refuses to issue, said defendant asserting that under said order he is

forbidden to issue any executions whatsoever in the premises.

[fol. 68] XIII. By reason of said injunction and restraining order intervenor is denied its taxes, its tax execution and the collection of its taxes now due by complainant and outstanding against said branch railroad.

Wherefore intervener prays that said order be revoked or so modified as to permit the defendant in original bill to issue to intervener the tax executions and certificates as hereinbefore set out and that said defendant be authorized to issue same and for such other and further relief as may to the court seem meet and proper.

And your intervener will ever pray.

S. H. Sibley, J. H. Beasley, Howes Cloud, Ligon Johnson, For Intervener.

STATE OF GEORGIA, County of Taliaferro:

C. W. Caldwell being duly sworn on oath says that he is one of the Commissioners of Roads and Revenues of Taliaferro county Georgia, intervener in the foregoing and hereinbefore styled cause; that he has read the foregoing intervention and that the same is true of his own knowledge except as to matters stated upon information and belief and those he believes to be true.

Sworn to and subscribed before me this — day of March 1906.

C. W. Caldwell.

C. H. Goluck, Clerk Supr. Court, Taliaferro Co., Ga.

Order

Let this intervention be filed without predujice and served upon the Georgia Railroad & Banking Co. by their solicitors of record.

This March 14th, 1906.

Wm. T. Newman, U. S. Judge.

Filed in Clerk's Office March 14th, 1906;

O. C. Fuller, Clerk,

Service°

Served copy of foregoing intervention upon Alex C. King of King, Spalding and Little solicitors of record of the Georgia Railroad & Banking Co. this 19th day of March 1906.

Ligon Johnson.

[fol. 69] Answer of Taliaferro County, Georgia

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTH-ERN DISTRICT OF GEORGIA

No. 1192. In Equity

GEORGIA RAILBOAD & BKG. Co.

VS.

WM. A. WRIGHT

Comes the defendant Taliaferro County Georgia, its demurrers and pleas herein having been over-ruled and files this petition of intervention herein as its answer in the

> S. H. Sibley, J. H. Beasley, Howes Cloud, Ligon Johnson, Attorneys for Def't Taliaferro Co. Ga.

Filed in Clerk's Office 3d day of July 1907.

O. C. Fuller, Clerk, By J. D. Steward, Deputy.

Demurrer of Taliaferro County, Ga.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

No. 1192. In Equity.

GEORGIA RAILROAD & BANKING COMPANY

VS.

WM. A. WRIGHT, et al.

Now comes the defendant Taliaferro County Ga. by leave of the Court and hereby adopts the demurrers and pleas herein of file of the defendant Wm. A. Wright as its own and as fully and completely as if same were specified, reiterated and filed in exact words.

S. H. Sibley, J. H. Beasley, Howes Cloud, Ligon Johnson, Attorneys for Taliaferro County Georgia.

Filed in Clerk's Office 3rd day of July 1907.

O. C. Fuller, Clerk, By J. D. Steward, Deputy.

[fol. 70] Order Making Wilkes and Taliaferro Counties Party Defendants

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTH-ERN DISTRICT OF GEORGIA

No. 1192. In Equity

GEORGIA RAILROAD & BANKING COMPANY

VS.

WM. A. WRIGHT; TALIAFERRO COUNTY, GEORGIA, WILKES.
COUNTY, GEORGIA, Interveners

Upon motion and without objection, it is ordered that the interveners Wilkes and Taliaferro Counties, Georgia, may be, and they are hereby made party defendants herein; that they may be, and are hereby permitted to adopt the demurrers and pleas of the defendant Wm. A. Wright, as their own, and that their petition- of intervention may be,

and are hereby permitted to be filed by said Wilkes and Taliaferro Counties as their answers in this cause.

This the 3 day of July 1907.

Wm. T. Newman, U. S. Judge.

Filed in Clerk's office 3rd day of July 1907.

O. C. Fuller, Clerk, By J. D. Steward, Deputy.

Order Over-ruling Demurrers

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

No. - In Equity

GEORGIA RAILROAD & BANKING COMPANY

TR.

WILLIAM A. WRIGHT, Comptroller General; County of WILKES & COUNTY OF TALIAFERRO

The demurrers of the defendants to the bill of complainant coming on for hearing, and counsel being fully heard, it is now

Ordered and adjudged by the court that said demurrers be each and all overruled, and that defendants answer over.

This the 3rd day of July, 1907.

Wm. T. Newman, U. S. Judge.

Filed in Clerk's Office 3rd day of July 1907.

O. C. Fuller, Clerk, By J. D. Steward, Deputy.

[1.1.71] Order Overruling Special Pleas

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHEBN DISTRICT OF GEORGIA

No. -. In Equity

GEORGIA RAILROAD & BANKING COMPANY

VS.

WILLIAM A. WRIGHT, Comptroller General; County of WILKES & COUNTY OF TALLAFERRO

The special pleas of the defendants to the bill in this case coming on for hearing, and counsel having been fully heard, it is ordered that the said pleas be each and all overruled.

This the 3rd day of July 1907.

Wm. T. Newman, U. S. Judge.

Filed in Clerk's Office 9rd day of July 1907.

O. C. Fuller, Clerk, By J. D. Steward, Deputy.

Stipulation of Counsel

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTH-ERN DISTRICT OF GEORGIA

In Equity

GEORGIA R. R. & BANKING CO.

VS.

W. A. WRIGHT, COUNTIES OF WILKES & TALIAFERRO

There being some doubt as to the proper practice in entering an appeal in this case, it is stipulated among the parties hereto by their respective solicitors that no objection or exception will be taken to any appeal because the same is joint, when it should be several, or vice versa, such question being hereby waived.

This July 3, 1907.

Jos. B. Cumming, Complainant's Solicitor. Jno. C. Hart, For Defendant W. A. Wright. Ligon Johnson, For Def'ts Wilkes and Taliaferro Counties.

Filed in Clerk's Cffice 3rd day of July 1907.
O. C. Fuller, Clerk, By J. D. Steward, Deputy.

Answer of Wm. A. Wright

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

No. 1192. In Equity

GEORGIA RAILROAD & BANKING COMPANY

VA.

WM A. WRIGHT

The answer of the above named defendant to the bill of

complaint of the above named plaintiff.

This defendant now and at all times hereafter saving to itself all and all manner of benefits of exception or otherwise that can or may be had or taken to the errors, uncertainties or imperfections in said bill contained, for answer thereto, says:

- 1. Respondent admits as true the allegations contained in paragraphs 1 and 2 of complainant's bill as to citizenship and residence of the parties therein named, and that the amount involved exceeds the sum of \$2,000.00; but denies that the controversy arises under the Constitution or laws of the United States.
- 2. Respondent admits as true the allegations in paragraphs 3, 4, 5, 6, 7 and 8, containing a recital of the historical facts connected with the formation and creation of complainant.
- 3. Respondent believes and hence admits as true the allegations in paragraph 9 as to the length of the main railroad and its branches, that is to say the total length of complainant's road is 229 miles.
- 4. Respondent denies the allegations in paragraph 10 contained. Respondent admits that subscribers for stock of said railroad in payment of their said stock paid to said corporation \$4,156,000.00 and that this sum went into the purchase of right of way, rolling stock, equipment and improvements, together with other large sums received from income, profits, rents and surplus, the banking business of complainant, and other sources. Respondent avers the total value of the property of complainant amounts to the sum of

\$11,000,000.00 which property and value is separate and distinct from the shares of stock owned and held by the stockholders of complainant. Respondent denies that said stock is invested in said property or otherwise, but avers that said stock is owned and held by the various shareholders of said road. Respondent denies that the payments for stock or any other funds were invested in the franchises of said corporation, but avers that the same were granted without consideration, from the State, other than to create subject to its right to tax same under its general power. Respondent further denies that the 440 shares of stock admitted by the complainant, as liable to taxation, are of the value of \$44,000.00 but avers the same to be of the value of \$118,800.00. Respondent denies that the net earnings of the property of said road constitutes the basis of any taxation, but submits that said property is taxable in the same manner and at the same rate as property in the State of Georgia, [fol. 73] and that said charter exemption was only intended for and applied to the shares of stock in the hands of the shareholders and owners thereof.

5. Respondent further answering says that the original capital subscribed, to wit; \$4,156,000.00 was invested in pursuance of the charter and that section 15 is a covenant made between the State and the stockholders in said corporation and by which contract the rate of taxation on the "stock" is fixed and inviolate. Respondent admits that the State is bound by the contract as therein expressed, viz: "that the stock of said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads, or any one of them; and after that shall be subject to a fax not exceeding one-half of one per cent per annum on the net proceeds of their investments" But respondent denies by the terms of said contract that the contention and conclusion of complainant is true in its assertion and claim as set forth in paragraph 11, that the State bound itself never to impose and levy a direct tax on the property in which said subscriptions were invested, but to receive in lieu of all taxes and burdens on said property, one-half of one per cent on the net proceeds of said investments. Respondent insists that the covenantmade was with the stockholders and the limitation of the tax rate was upon the shares of stock in his hands, and denies that the covenant was a limitation of the tax rate on the

property of the corporation or its net income, and says that said property is liable as such to an ad valorem tax as all other property in the State of Georgia, not exempted by the Constitution.

- 6. Respondent believes it to be true as alleged in paragraphs 12 and 13 of complainant's petition that it has, whenever it has earned a net dividend, paid the State taxes on the basis of net income, but denies that its immunity from taxation on its property has been due alone to that construction of the contract and for that length of time, for it has been of only recent date that any railroad property in Georgia was taxed "ad valorem." The Act taxing railroad property in Georgia "ad valorem" for State, county and municipal purposes began first in 1874 for State purposes, and culminated in 1888 for State, county and municipal taxation.
- 7. Respondent admits the allegations in paragraph 14 touching the return of complainant's property for taxation and the refusal of respondent as comptroller General of the State to receive the return on the basis of one half of one per cent on the net proceeds of the railroad company's investments and he comanded that the property should be returned for taxation at its true market value and still insists that the property of the railroad company as such is liable to taxation as other property in Georgia, to wit, ad valorem.
- 8. The allegation in paragraph 15 as to the passage by the General Assembly of the Act entitled "An Act to provide for and require the payment of taxes on franchises, and to prescribe the method of payment and return of said taxes", is true.
- 9. Respondent also admits as alleged in paragraph 16 that complainant made the return marked exhibit B in his origifol. 74] nal petition under protest except as to the \$44,000.00 as aforesaid, which it admits is subject to a property taxation. Respondent denies that a return of \$44,000.00 as representing the subscription of stock of said company under the Act of 1868 was a fair and just return, but that said stock being worth now \$270.00 per share it should have been returned at \$118,800.00 as so much property for taxation at the general rate.

- 10. Respondent admits the allegations in paragraph 17, that complainant has offered to pay one-half of one per cent on the net earnings of the trailroad company, and that respondent has refused to accept this payment and insists that complainant is liable for taxation on its property at the general rate fixed by the State for State purposes and the rates fixed by counties and municipalities through which complainant operates its said railroad and that the property and a franchises of said railroad company are liable to taxation at such combined rate.
- 11. Respondent denies the allegations in paragraphs 18 and 19, that the railroad property and its branches are exempt from taxation in excess of one-half of one per cent on its net earnings and further denies that the Constitution of the State and the laws in pursuance thereof making liable to taxation its property, impair the obligation of the marter contract of complainant; it being the insistence of respondent that by section 15 of the Act of 1833 chartering said company, the contract was with the stockholder and related solely to the shares of stock, and was not a contract not to tax the property of the complainant.
- 12. Respondent admits the allegation in paragraph 20, that he was seeking to collect the excess in value of complainant's property over and above the original subscription, which excess in value, according to the return of complainant is \$1,999,756.00 and is liable to taxation at the general rate; and he now insists not only such excess is liable to taxation ad valorem and at the general rate, but that all of complainant's property is liable to taxation ad valorem and at the general rate fixed upon other property.
- 13. Respondent admits the allegations in paragraphs 21 and 22, viz: that he insists that the franchises of complainant is liable to State, county and municipal taxation and he admits that he was proceeding and would have collected the taxes thereon at the general rate levied or property in this State except for the restraining order of this Honorable Court, believing and insisting that said property is so liable for taxation as other property in this State.
- 14. Respondent admits the taxes demanded by him of the complainant are in excess of one half of one per cent on the net earnings of the complainant, but denies that the char-

ter of complainant is a contract between the complainant and the State not to demand an ad valorem tax on the property of the complainant. Respondent believes to levy tax on the stock of the shareholders in excess of one half of one per cent on their net investments would be to impair the obligation of the legislative contract, but he is not seeking to levy and collect any tax whatsoever upon the stock [fol. 75] of the shareholder, but he was proceeding to levy and collect taxes on the property of the complainant at the rate fixed by law upon all other property in this State.

- 15. Respondent further answering says it is not true as alleged in paragraph 24 that he has demanded that the property of complainant shall be returned at a higher valuation than other species of property in the State is returned for taxation and he denies it to be the practice of taxing officers of this State to receive other species of property of citizens of this State for taxation at a less percentage than the property of railroads is required by this respondent to be returned for taxation. Further answering says that if any officer charged with the duty of receiving property for taxation in Georgia treats railroad property as to valuation otherwise than all other property is treated, that such officer does so in violation of law, for it is expressly provided by the Constitution of this State that all taxes shall be uniform and ad valorem.
- 16. Respondent admits the allegations in paragraph 25 relative to the returns of property for taxation by railroad companies, but denies the conclusion reached by complaint in paragraph 28, that the owners of said railroad property in being required to comply with the law touching the return of "franchises" for taxation, has, or is, being denied the equal protection of laws.
- 17. Respondent further answering says as alleged in the original petition that he is the Comptroller General of the State of Georgia, and as such it is his duty to require and receive the returns of railroad property for taxation. He has proceeded to assess and collect the taxes due by the complainant to the State of Georgia on its property and franchises, when restrained by this Honorable Court. It is the insistence of respondent that under the provision in question, to wit; section 15, of complainant's charter, that the covenant touching taxation was and is a contract be-

tween the stockholder and the State and related to the shares of stock. He prays the Court, since it now has jurisdiction of this entire case, in order that respondent may properly exercise his duty in the premises as Comptroller General, that this Court will construe Section 15 of the charter of complainant, or so much thereof as relates to the subject of taxation. Respondent submits his contentions and Taxokes the judgment of the Court thereon as follows:

First. That the provision made in section 15, as follows "The stock of said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads or any of them; and after that, shall be subject to a tax not exceeding one-half per centum per annum on the net proceeds of their investments," is a covenant that the stock or shares shall not be taxed exceeding one-half per cent on the net proceeds of their investments, and is not a limitation of the tax rate on the property of complainant.

Second. If the Court should construe the limitation to refer to the original subscription, whether in stock or as an investment, then it is the insistence of respondent that the excess of property over and above such original subscription is liable to taxation at the general rate. That is to say [fol. 76] the original capitalization being \$4.156,000 is liable to taxation at the rate of one-half of one per cent on the net proceeds of the investment, and the excess of property as shown by the return of complainant, to wit, \$1,999,756 is subject to taxation as so much property for State, county and municipal purposes as provided by the Act of 1874.

Third. Should the Court construe the word "stock" as meaning a covenant with the State to tax neither the stock of the shareholder or the capital stock of the company beyond the limit therein fixed, it is insisted that the element of franchise granted the company, as such is property not protected by charter, and should be taxed at the general rate.

Fourth. It is the insistence of respondent that the \$44,000 represented by 440 shares of stock issued by virtue of the Act of 1868, should not be returned as \$44,000 as so much stock for taxation, or as representing that much property for taxation, but since the shares of stock of said railroad company is now worth on the open market \$270.00 per share,

the return should be \$118,800 as so much property for taxation, and it should be decreed that the complainant is liable to taxation for State, county and municipal purposes as a return of property for that amount.

Fifth. It is further insisted that the \$325,000 surplus money now on hand as shown by Exhibit B under the return of the complainant is liable to taxation as so much property at the general rate.

18. Respondent having fully answered submits that the injunction awarded against him by this Honorable Court on the — day of January, 1904 should be dissolved and that said bill ought to be dismissed with costs in this behalf expended.

Jno, C. Hart, Counsel for Defendant.

GEORGIA,

Fulton County:

You, Wm. A. Wright, defendant in the above stated case blo swear that the foregoing answer is true to the best of your knowledge and belief, so help you God.

Wm. A. Wright, Defendant.

Sworn to and subscribed before me this 3 day of March; 1904.

W. H. Harrison, N. P., Fulton Co. Ga.

Filed in Clerk's office July 3, 1907.

O. C. Fuller, Clerk.

[fol. 77] Amendment to Answer of Wm. A. Wright

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTH-

In Equity

THE GEORGIA RAILEOAD & BANKING COMPANY

VS.

WM. A. WRIGHT

And now, before decree in said case, and not waiving the demurrers and pleas of file in the case, but with all the reservations made in the original answer, comes the defend-

ant, and by leave of the court amends his answer to paragraph 10 of the petition as follows, to-wit:

Defendant avers that the property of the complainant, in its return for taxation exhibited in the petition, except as to the road bed and a portion of the other reality, is not the property in which the capital of said company was originally invested, but that the rails and ties of the main lines of the tracks then constructed have been many times replaced by new ones, each time the track being made heavier and more valuable, so that the track is now worth at least double its original value, and the buildings appurtenant to said railroad have been renewed and enlarged from time to time, and new stations, depots and office buildings have been from time to time erected, so that the present value of these is many times what the value of the original buildings was; and the original engines, cars, and other rolling stock have long since been worn out or discarded, and new engines and cars and other rolling stock have been purchased, much more humerous, and many times more efficient and valuable than heretofore; that new and valuable appliances for track repairs, for removing wrecks, shops for the building and repair of rolling stock, and other tools and appliances have been from time to time purchased and added to the property of said complainant; and that while the number of miles of main line is still the same as originally, extensive purchases of additional lateral right of way have been recently made, and many miles of new side tracks constructed, and extensive vards and track facilities constructed at both termini of the road. By reason of which things defendant avers that not only has the value of the property of complainant been greatly enhanced but its identity and substantial character materially changed. Defendant further avers at the close of the Civil War in 1865, the railroad of complainant was in parts wholly demolished, and much of its property swept away, and its restoration even to its original condition involved a large outlay of funds. Defendant avers that funds to make these additions and betterments were in part obtained from accumulations of profits of the complainant's enterprise which were by it reinvested therein, in part from the sale of said 440 shares of new stock in the petition mentioned, and in part from the sale of bonds of the complainant. Defendant contends that in no event should the entire present property of complainant

at its present value be declared exempt from all tax except [fol. 78] that in the said 15th section of its charter mentioned, and defendant absolutely enjoined from collecting any other tax, but that said section should be construed, and if found to protect any of the present property of complainant from property taxation, defendant should be adjudged free to assess and tax such property and values as age not so protected, from year to year, and under such machinery as is by the laws provided.

John C. Hart, Attorney General, Solicitor for W. A. Wright.

Georgia, Fulton County:

In person appeared before me a person authorized to administer an oath, the defendant W. A. Wright, who being duly sworn, says that he has read the foregoing amendment to his answer as well as the original answer in said case and that the statements of fact in said amendment and answer are true.

Wm. A. Wright.

Swern to and subscribed before me this July 3rd, 1907: W. H. Harrison, Notary Public, Fulton Co., Ga.

ORDER.

By special leave of the court, all parties consenting, ordered that the within amendment be allowed and considered as a part of the original answer.

July 3, 1907.

Wm. T. Newman, U. S. Judge.

Filed in Clerk's office July 3rd, 1907.

O. C. Fuller, Clerk.

Final Decree

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTH-ERN DISTRICT OF GEORGIA

No. - In Equity

THE GEORGIA RAILROAD & BANKING COMPANY

VS.

WILLIAM A. WRIGHT, Comptroller General

BILL FOR INJUNCTION, ETC.—Filed January 7th, 1904

This cause coming on to be heard upon the bill of complaint of the Georgia Railroad & Banking Company vs. William A. Wright, Comptroller General, and amendments thereto and the exhibits to the same, and the answer and [fol. 79] amendment thereof interposed thereto by the defendant, William A. Wright, Comptroller General, and upon the answer of the defendant Wilkes County, and upon the answer of the defendant Taliaferro County, it is

Considered, ordered and adjudged by the court that the Charter of the complainant, to wit; the Act of the Legislature of Georgia of December 21st, 1833, and various other Acts of saids Legislature, passed prior to the 1st day of January, 1863, is a valid and binding contract between the State of Georgia, and complainant the Georgia Railroad

& Banking Company;

That the said Charter covers complainant's main railroad between the cities of Augusta and Atlanta, in said State one hundred and seventy-one miles; its branch railroad. between Barnett and the City of Washington, in said State, eighteen miles; and its branch railroad between Union Point and the City of Athens, said State, forty miles; and all of . the appurtenances of said railroad including their rolling stock; also complainant's franchise to be a corporation and other franchises without reference to the caluation of all of said property; which valuation it is admitted exceeds by four millions of dollars the nominal value of the capital stock of said Company, said excess being produced by natural increase in the value of said property and by renewals, alterations and betterments of the same from time to time by the complainant. The said Charter provides a system of taxation for said property exclusive of

all other taxation, to wit; one half of one per cent of the net earnings of said property.

That all property of complainant other than that above: specified including so much of said property as is represented by four hundred and forty shares of stock subscribed under the Act of Oct. 5. 1868, is highle to taxation under the general laws of the State of Georgia.

It is further ordered, adjudged and decreed that defend and be perpetually enjoined from levying and collecting any taxes, State, county or municipal from said complain-

ant not in accordance with this decree.

This the 3rd day of July, 1907.

Wm. T. Newman, U. S. Judge.

Filed in Clerk's office 3rd day of July 1907. .O. C. Fuller, Clerk. By J. D. Steward, Deputy:

UNITED STATES OF AMERICA:

The President of the United States to the Georgia Railroad and Banking Company and Joseph B. Cumming and A. C. King, its attorneys, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within thirty days from the date of this writ, pursuant to an appeal filed in the Clerk's office of the Circuit-Court of the United States for the Northern District of Georgia, wherein William A. Wright, The County of Wilkes, and [fol. 80] The County of Taliaferro are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said appeal mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this tenth day of January, A. D. 1908, and of the independence of the United States the One Hundred and Thirty

Wm. T. Newman, United States District Judge, Presiding in the Circuit Court Aforesaid.

di.

Attest: O. C. Fuller, Clerk, by W. C. Carter, Deputy Clerk.

Service of the above Citation, and receipt of a copy, admitted this 10 day of Jan'y, 1908.

Jos. B. Cumming, Alex. C. King, Solicitors for The Georgia Railroad and Banking Company, Appellee, Complainant in the Lower Court.

Filed in Clerk's Office 10th day of Jan'y, 1908.

O. C. Fuller, Clerk, by W. C. Carter, Deputy.

[Endorsed:] Circuit Court of United States, Northern District of Georgia. The Georgia Railroad & Banking Company vs. Wm. A. Wright, County of Taliaferro, County of Wilkes. Citation for appeal. Filed in Clerk's office Jan'y 19, 1908. O. C. Fuller, Clerk, by W. C. Carter, Dep. Clerk.

Appeal

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTH-ERN DISTRICT OF GRORGIA

In Equity

THE GEORGIA RAHLROAD AND BANKING COMPANY

VS.

WILLIAM A. WRIGHT and THE COUNTY OF WILES and THE COUNTY OF TALIAFERRO

The above named respondents, William A. Wright, The County of Wilkes, and the County of Taliaferro, considering themselves aggreed by the order and decree made and entered in the above stated court in the above stated case, on the third day of July, 1907, whereby it was ordered, adjudged and decreed that the Acts of the Legislature of Georgia of Dec. 21, 1833, and the various other acts of said legislature, passed prior to the 1st day of Jan. 1863, and constituting the charter of the complainant company, are [fol. 81] a valid and binding contract between the State of Georgia and the said complainant, the Georgia Railroad and Banking Company; that the same covers the roads of said complainant therein mentioned, with an appurtenances,

including rolling stock and the franchise to be a corporation, without reference to the valuation of said property; that said charter provides a system of taxation of said company exclusive of all other taxation, to wit; one half of one per cent. of the net earnings of said property; and that the defendants be perpetually enjoined from levying any taxes, state, county or municipal, from complain int not in accordance with this decree—do hereby appeal from said order and decree of July 3, 1907, to the Supreme Court of the United States for the reasons specified in the assignment of errors filed herewith, and they pray that this appeal may be allowed, and that a transcript of the record, papers and proceedings upon which said order and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Jno. C. Hart, Sam'l H. Sibley, Solicitors for Respondents Wm. A. Wright. Ligon Johnson, Sam'l H. Sibley, Solicitor- for Respondents County of Wilkes and County of Taliaferro. Hooper Alexander, Solicitor for Respondent William A. Wright.

Filed in Clerk's Office 10th day of Jan'y, 1908.

O. C. Fuller, Clerk, by W. C. Carter, Deputy.

· Order Allowing Appeal

The foregoing petition for appeal is granted, and the claim of appeal therein made is allowed.

This January 10th, 1908.

Wm. T. Newman, Judge of the District Court for the Northern District of Georgia and Presiding in said Case.

Filed in Clerk's Office 10th day of Jan'y, 1908.

O. C. Fuller, Clerk, by W. C. Carter, Deputy.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTH-ERN DISTRICT OF GEORGIA

In Equity

THE GEORGIA RAILBOAD AND BANKING COMPANY

VIS.

WM. A. WRIGHT and THE COUNTY OF WILKES and THE COUNTY OF TALIAFERRO

Know all men by these presents that we, Wm. A. Wright, The County of Wilkes and the County of Taliaferro, as principal and R. E. Park as security are held and firmly bound ounto the Georgia Railroad and Banking Company in the sum of Five hundred dollars to be paid the aforesaid, Georgia Railroad and Banking Company, its successors or assigns; to which payment well and truly to be made we bind ourselves, our successors, heirs, executors and administrators firmly by these presents.

Sealed with our seals and dated this 10th Jany. 1908.

Whereas the above named respondents Wm. A. Wright, County of Wilkes and County of Taliaferro have appealed to the Supreme Court of the United States from a decree in favor of the above named complainant, The Georgia Railroad and Banking Company rendered in the above entitled case or July 3, 1907 in the Circuit Court of the United States for the Northern District of Georgia, to reverse said final decree, Now therefore the condition of this obligation is such that if the said appellants shall prosecute their appeal to effect and answer all costs and damages that may be awarded against them or either of them if they or either of them fail to make good their appeal, then this obligation to be void; else of full force and effect.

Wm. A. Wright, R. E. Park, County of Wilkes, County of Taliaferro, by Ligon Johnson & Sam'l H. Sibley, Solicitors.

This bond approved as to form, amount and sufficiency of securities, this 10th Jany. 1908.

Wm. T. Newman, Judge United States District Court, Northern District of Georgia.

Filed in Clerk's Office 10th day of Jany. 1908.

O. C. Fuller, Clerk, by W. C. Carter, Deputy.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

In Equity

THE GEORGIA RAILROAD AND BANKING COMPANY

VS.

WILLIAM A. WRIGHT, THE COUNTY OF WILKES, and THE COUNTY OF TALIAFERRO

And now come the respondents, and file the following assignment of errors particularly stating the errors on which they and each of them will rely in the prosecution of their apper from the decree made in the above entitled cause by this honorable court on July 3, 1907.

It The court erred in not sustaining the first paragraph of respondent's demurrer to the bill as amended, alleging that the amended bill presented no federal question, was a suit between citizens of the same state, and the court was without jurisdiction; because by said amendment the complainant alleged that the entire cause was estopped by a former judgment therein set up, and the existence and effect of an estoppel by judgment of a state court between the same parties is not a federal question. The court should have declined to entertain the amendment, as one tending to oust the court of jurisdiction of the cause; or, having allowed it, should have dismissed the bill for want of jurisdiction.

2. The court erred in not sustaining the second paragraph of respondent's demurrer, that the complainant, by its own showing, was not entitled to the relief prayed; because the petition, construed with the public laws affecting the complainant's charter, and the constitution and laws of the State on the subject of taxation, showed upon its face that the property of complainant sought to be taxed (including its franchise) was liable to taxation, and was not exempt therefrom under the 15th section of complainant's charter as alleged, and that the respondent W. A. Wright was proceeding lawfully to collect taxes upon the same.

- 3. The court erred in not sustaining the third paragraph of respondent's demurrer, which attacked Paragraph 23 of the bill relating to the effort to tax complainant's franchise under the Act of Dec. 17, 1902; because the franchise sought to be taxed is shown by said bill not to be a part of the property sought to be exempted from taxation by the 15th section of the charter and not to be a part of the "stock of the company" contributed by the corporators, but a value contributed by the State of Georgia; and the said act taxing such franchise is in impairment of no contract with the corporators as alleged.
- 4. The court erred in not sustaining the fourth paragraph of respondent's demurrer to the bill, which averred that by complainant's own showing its present property was largely in excess of the capital stock permitted by the [fol. 84] original charter of complainant, which excess represented accumulated profits, surplus and subsequent investments, and that such excess was not protected by the limitation on taxation in said original charter contained. The original capital stock, as shown by said charter, was \$1,500,000.00. Increase to \$4,000,000 was authorized from time to time under later laws. The court erred in not limiting any exemption from general taxation of complainant's property, as being the equivalent of the "stock" mentioned in the charter to said original \$1,500,000 and in not limiting it to said \$4,000,000 of value.
- 5. The court erred in not sustaining the exceptions filed by respondents to Paragraph 24 of the petition, which paragraph, for the reasons stated in said exception should have been stricken.
- 6. The court erred in over-ruling the plea filed by the respondents; because the decision of the Supreme Court of Georgia in the cases therein set forth was a judgment between the same parties, and was an authoritative construction of the charter of complainant, in accordance with which W. A. Wright was acting in this case. Said construction should have been sustained as an adjudication binding upon the parties.
- 7. The court further erred in over-ruling said plen, because the decision of the Supreme Court of Georgia therein set out was a construction and interpretation by said court in a litigation between the same parties, of the former

decision of said court in the case between said parties which is relied on as an estoppel by the complainant in the amendment of its bill, defining the meaning of said decision, and limiting its application. The meaning and effect of said first decision being a question of general law, and not a federal question, the construction of the same made by the court of last resort of Georgia especially in a case to which complainant was a party, will be observed and respected by this honorable court.

- 8. The court erred in adjudging that the judgment in the case of the Georgia Radroad and Banking Company vs. the State of Georgia which was exhibited in the amendment of the bill was res judicata and conclusive of the issues in this case; because said judgment was pronounced by the courts of the State of Georgia in a contest over the taxes for the year 1874, and under the law of Georgia, the decisions of its courts in matters of taxation are conclusive between the parties only as to the taxes of the year actually involved, and the decisions of said courts will not have a wider effect when urged in the federal courts as an estoppel.
- 9. The court further erred iff adjudging said judgment to be conclusive of the issues in this case as an estoppel, because the pleadings in said former ease show that the. only issues involved therein were (a) Whether the charter of the complainant contained a valid contract of exemption from taxation, (b) Whether the same had been rendered repealable by the acceptance of franchises subsequent to to Jan. 1, 1863 and (c) Whether the Act of 1874 repealing all such exemptions was effectual as to the charter of complainant; and no other issues were actually or necessarily decided. The issues arising in this case as to (a) Whether it was the shares of stock in the hands of the shareholders, or whether it was the capital stock paid in by them that [fol. 85] was protected from taxation; and (b) the issue whether the property of complainant is greater in value than the capital subscribed under said charter, and (c) whether it is not different property from that subscribed, or originally purchased, and (d) has not been increased by additional investment of surplus earnings and proceeds of sale of bonds; were not made and litigated in said prior case, and cannot be estopped by the judgment therein.

- 10. The court further erred in holding said former judgment to be an estoppel of the issue in this suit that the property of the complainant liable to taxation was greatly in excess of the capital subscribed under said charter and under the protection of its tax exemption, and that the original property had been added to and substituted by other, and that large investments of surplus earnings and proceeds of bond sales had been made; because said facts did not appear in said former suit, and the "question sought to be estopped was not necessarily presented and determined upon exactly the same facts."
- 11. The decision of the Supreme Court of Georgia in said former case declared that the investment of the capital stock sold under the Act of 1868 was not protected by the charter. The court below erred in not adjudicating said decision to be an estoppel and conclusive that all other investments made since the original charter and the subscriptions thereunder and since 1863 whether of surplus earnings or the proceeds of bond sales or otherwise, were equally unprotected by the original charter.
- 12. The court erred in decreeing that the limitation of taxation in the complainants charter covered its railroad and appurtenances as mentioned in the decree regardless of their value, because—
- (a) Under a true construction of the charter, the same limited the taxation only of the shares of stock of the shareholders, and not of the property of the corporation.
- (b) If the property of the corporation be protected from taxation at all, the protection extends, under a strict construction of the exemption, only to such a value of property as is measured by the original "stock" authorized by and paid in on the faith of the said charter; betterments, substitutions, enlargements, and further investment of funds from whatever source, are not exempted from general taxation.
- 13. The court erred in decreeing that the right of complainant to be a corporation was protected from taxation beyond the limit fixed in said charter; because said franchise is taxable under the laws of Georgia, and it was in no sense a part of the "stock" contributed by the corporators on the faith of the charter, but was a valuable

property contributed by the State of Georgia itself, as to the taxation of which no stipulation was made.

- 14. The court erred in decreeing that the charter of complainant provided an exclusive method of taxing complainant's property; because (a) the taxation therein provided for was not of the property at all, but of the "stock" and (b) was not exclusive, because applying at most only to such property as represented the money paid in by the corporators, and not to additions, betterments and in[fol. 86] creases due to other investments; or to the franchise of complainant which was contributed by the state.
- 15. The court erred in holding that the branch road of complainant from Barnett to Washington, eighteen miles, was covered by complainants original charter and exempt from other taxation than that provided by said charter; because it was shown that said branch road was constructed under separate legislative authority granted to another company, in which no exemption from or limitation of taxation was provided and because the consolidation of said company with complainant company did not operate to extend the charter exemption from general taxation over said branch road, nor was there any consideration for a grant of such exemption at the time of said consolidation, and because the laws and constitution of Georgia do expressly impose uniform taxation thereon.
- 16. The court erred in adjudging that the original charter of complainant, and such tax exemptions as it may contain, apply to the branch road of complainant from Barnett to Washington, and that the amendments of complainants charter under which it received and constructed said branch road did not subject said branch road and property held in connection therewith, to general taxation.
- 17. The court erred in holding that complainants charter constituted a continuing and continuous contract of exemption from general taxation; and in holding that any such contract has existed or been of force since 1882; and in holding that since the year 1882 the complainant has not held said roads authorized in its charter subject to such terms and conditions as to taxation by the state and its counties and were or might be fixed by the laws of Georgia.
- 18. The court erred in adjudging and decreeing that the respondent Wm. A. Wright be enjoined from collecting

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taxes under the laws of Georgia upon said branch road from Barnett to Washington and its appurtenances; and upon the property of complainant generally in excess of the value contributed under its charter by its corporators; upon its franchise to be a corporation; and upon all the property of complainant not shares of stock in the hands of its shareholders; because the same were each liable to taxation under said laws, and not exempted therefrom

under the Constitution of the United States.

In order that the foregoing assignments may be made a part of the record, respondents present the same to the court, and pray a reversal of the decree and that such disposition be made of the cause as equity and the laws of the United States require.

Jno. C. Hart, Att'y. for W. A. Wright. Ligon Johnson, Sam'l H. Sibley, Solicitors for Wilkes & Taliaferro Counties.

Filed in Clerk's office Jan'y 10th, 1908.
O. C. Fuller, Clerk, By W. C. Carter, Dep. Clerk.

[fol. 87] CIRCUIT COURT, UNITED STATES, NORTHERN DISTRICT OF GEORGIA

In Equity

GEORGIA RAILROAD AND BANKING COMPANY

VS.

W. A. WRIGHT et al.

In the pleadings of the respondents in said case, reference is made to the case of "Goldsmith, Comptroller General vs. Georgia Railroad and Georgia Railroad Company vs. Goldsmith, Comptroller General, reported in the 62 Ga. p. 485 et seq." and in the hearings of the case at bar the record of the cases cited were considered by agreement as exhibited in the pleadings and in evidence before the court and were passed upon by the court. The full record of said cases consists of a fi. fa. each for the taxes for the years 1875, 1876 and 1877 followed each by an identical affidavit of illegality and bond. The three cases thus made were consolidated and tried together, much evidence being introduced which is immaterial here. The decision of the

lower court was excepted to appropriately by each side, and the decision of the Supreme Court of Georgia pronounced, which was thereafter duly made the judgment of the trial court. In order to abridge the record in the case at bar it is stipulated and agreed that the attached transcript contains all the portions of said records material to this case, and that said transcript with this stipulation be made a part of the record in this case, and be transmitted to the Supreme Court of the United States as such

Jos. B. Cumming, Sol. of the Ga. R. R. & B. Co.;

Ligon Johnson, Sam'l H. Sibley, Sol's Counties

Wilkes & Taliaferro; Jno. C. Hart, Sam'l H. Sibley,

Sol'rs for Wm. A. Wright.

Ordered that the foregoing stipulation, and attached transcript be made a part of the record in the case of Georgia Kailroad and Banking Company vs. W. A. Wright, et al.

This January 10th, 1908.

Wm. T. Newman, U. S. Judge.

Transcript of Record, State of Georgia vs. Ga. R. R. & Bk. Co.

Comptroller General's Office.

State of Georgia, Fulton County, to all and singular the Sheriffs and other lawful officers of this State:

You are hereby commanded that of the goods and cuattels, lands, tenements and franchises of the Georgia Railroad [fol. 88] & Banking Company a corporation chartered and doing business in this State, you cause to be made the sum of nineteen thousand and two hundred and one 18/100 (\$19201.18) dollars as its tax for the year 1875, assessed against it upon a return made by the Comptroller General of Georgia, according to law, from the best information he could procure, and the further sum of fifty-seven thousand six hundred and three 54/100 dollars as penalty and costs and that you pay over said sum of money to the Comptroller General of said State, at his office in Atlanta, Ga. and return thereon this execution, with your actings and doings entered thereon.

Witness W. L. Goldsmith, Comptroller General of said State under his official hand and the seal of said office. Issued this the third day of December 1877.

W. L. Goldsmith, Comptroller General of Georgia. (Seal.)

Levied the within fi. fa. upon all that lot or parcel of land with the improvements thereon, situate, lying and being in the city of Augusta, county of Richmond and State of Georgia, bounded north by Walker street, east by Jackson street, south by Fenwick street, west by Campbell street, excepting a strip of land 90 feet wide, between Jackson and Campbell street, belonging to the city of Augusta, and known as Watkins street; also, upon all that other lot, with the building thereon, lying and being in said city, county and State, known as the Georgia Railroad Bank, bounded north by lot belonging to the estate of Molyneaux, east by McIntosh street, south by Broad street, west by lot belonging to the Augusta factory, this 28th day of December 1877.

Charles H. Sibley, Sheriff of Richmond County.

Affidavit of illegality having been interposed by the Georgia Railroad & Banking Company, the levy is stopped. Charles H. Sibley, Sheriff of Richmond County.

STATE OF GEORGIA

VB.

THE GEORGIA RAILROAD & BANKING COMPANY

Comptroller-General's Execution for Tax for the Year 1875.

No. 80. \$19,201.10. Penalty. 57,603.50.

The above described fi. fa. levied by the sheriff of Richmond county on the following property of the defendant, the said Georgia Railroad and Banking Company, to wit; All that lot or parcel of land, with the improvements thereon, situate, lying and being in the city of Augusta, county of Richmond, and State of Georgia, bounded north by Walker street, East by Jackson St. South by Fenwick street, west by Campbell-street, excepting a strip of laud

[fol. 89] 90 feet wide, extending from Campbell to Jackson street, belonging to the city of Augusta, and known as Watkins street. Also all that other lot, with the buildings thereon known as the Georgia Railroad Bank, lying and being in the city of Augusta, county and State aforesaid, bounded north by lot belonging to the estate of Molyneaux, east by McIntosh street, south by Broad street, west by lot belonging to the Augusta Factory. Levied by Charles H. Sibley, Sheriff of Richmond county on the 28th day of December 1877.

And now comes the defendant in said fi. fa. the Georgia Railroad & Banking Company, and says that said fi. fa. levied as above stated, is illegal, and is proceeding illegally; Because it says that the charter of incorporation of this defendant was granted by a public act of the Legislature of Georgia, approved December 21, 1833 by which act, in the 15th section thereof, it is provided and declared that the stock of said company and its branches shall be subject to a tax not exceeding one half per cent. per annum on the net proceeds of their investments.

And the stock of this defendant was subscribed under said charter, and on the faith of its provisions. And the corporators accepted said act of incorporation, and organized under the same, and expended the stock of the company subscribed and paid in by the stockholders in the construction and equipment of said road and branches. And the said provision in said charter has never been repealed or changed by the consent of the defendant; but this defendant has constantly used and enjoyed and exercised the rights, franchises and immunities granted them by their said charter until the passing of the act in this illegality hereinafter complained of and ever since, unless prevented by said act and proceedings under the same.

And this defendant further says that all the property of this defendant on which said tax is assessed, on which said fi. fa. is issued, is the property in which the capital stock of defendant has been invested, and constitutes and is the stock of said company and its branches, and the tax so assessed is a tax on said stock, and far exceeds the amount of one half per centum on the net proceeds of their investments, which last named tax for 1875 is twenty one hundred and twenty eight dollars and thirty nine cents (\$2,128.39) which this defendant has already paid to the Comptroller General of this State.

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. And the defendant further says that there is no valid law of said State under which said tax ft. fa. is issued; and that the act of the Legislature, approved February 28, 1874, entitled "An Act to amend the tax laws of this State so far as the same relates to railroad companies, and to define the liability of such companies to taxation and to repeal so much of the charters of such companies respectively as may conflict with the provisions of this act," is void and of no effect in so far as it attempts to repeal any portion of the charter of this defendant, or to impose another or greater tax than one Half per cent. per annum of the net profits of this defendant's investments, on the stock of this defendant, or the property in which said stock is invested, because said act is in conflict with the Constitution of the United States, as being an act impair-[fol. 90] ing the obligation of a contract, and therefore violates the first paragraph of the tenth section of the first article of the said Constitution of the United States.

And his defendant further says that heretofore, to wit on the 2nd day of October, 1874, the Comptroller General of the State of Georgia, issued an execution against this defendant for tax f. fa. No. 6 upon its property, under the provisions of the said act above referred to, approved the 28th day of February 1874, and on the 3rd day of October 1874 Le said fi. fa. was levied by the sheriff of Fulton county A. M. Perkerson, on the property of this defendant, and on the 20th day of October, 1874, this defendant filed its affidavit of illegality according to the provisions of the third section of said act, and in terms thereof. declaring and setting forth that said fi. fa. was illegal, upon the ground and for the causes above set forth in this affidavit; and that on the 17th day of December, 1874, the said illegality was tried before and by the Superior Court. of Fulton County to which court the same was, by the said act, made returnable, and which court, by the provisions of said act, had jurisdiction to try said illegality; and that on the day and year last aforesaid, the said Superior Court of Fulton County; upon the trial of said cause, ordered and adjudged that the oath of illegality be sustained as to all tax claimed except the tax upon four hundred and forty shares of new stock, valued at ninety-three dollars per share, being the sum of two hundred and four dollars and fifty cents and that the fi. fa. proceed to collect said last named sum, and the further sum of - for costs.

Which decision of the said Superior Court of Fulton county was on the 21st day of December, 1874, carried, by bill of exceptions, at the instance of both parties, to the Supreme Court of the State of Georgia, and at the January . Term 1875, of said Supreme Court, the said decision of. the said Superior Court of Fulton county was by the said Supreme Court affirmed, and the remitt-ur from the said Supreme Court was returned to, and made the judgment of, this Court by the Superior Court of Fulton county, which decision, the defendant says, was rendered in a cause between the same parties as are here at issue, to wit; The State of Georgia against the Georgia Railroad and Banking Company (this defendant); that the said cause embraced, and in the same was wawn in question, among other things, the same subject matter as is here drawn in question to wit; the validity of the charter of this defendant, and particularly the validity of so much of said charter as prohibits the taxing of the stock of this defendant, or imposing upon it any other or greater tax than one half percentum upon the net profits of its, investments; also, the constitutionality of the said act of the Legislature, approved the 28th day of February 1874, and all amendments thereof; and also the power of the State to tax the stock of this defendant or the property in which its stock had been invested; and that the judgment rendered in said cause was rendered by a court having jurisdiction to try the same, and was rendered and said questions were adjudicated in favor of this defendant; and this defendant here pleads the same as a former - recovery and a bar to the present proceedings, and as an estoppel to prevent the State from making the same questions again, and as an end of litigation.

[fol. 91] This defendant further says, that so much of said fi. fa. as is for penalty of fifty-seven thousand six hundred and three dollars and fifty cents, is illegal, because there is no law subjecting this defendant to a penalty for resisting said tax, levied and assessed under said act of February 28th, 1874. And there is no law authorizing the Comptroller General to impose on this defendant any penalty whatever for any cause existing in relation to taxes due by this defendant to the State.

Jos. B. Cumming, Henry Hillyer, for the Ga. R. R. & B. Co.

STATE OF GEORGIA, Richmond County:

You, John P. King, President of the Georgia Railroad and Banking Company do swear that the facts stated in the above and foregoing affidavit of illegality are true.

Jno. P. King, Pres't.

Sworn to and subscribed before me this 22nd day of January, 1878. A. S. Morris, Not. Pub., R. C. Ga.

GEORGIA,

Richmond County:

Know all men by these presents, that the Georgia Railroad and Banking C mpany as principal and Ino. P. King as surety are held and bound unto the Governor of the State of Georgia and his successors, in the sum of one hundred and sixty thousand dollars for the payment of which they bind themselves by these presents.

In witness whereof, the said company hath caused these presents to be signed by its President, and countersigned by its cashier, and sealed with its corporate seal, and the said surety hath hereunto set his hand and seal, this 21st day of January 1878.

The condition of this obligation is that whereas the Comptroller General of the State of Georgia bath issued against the said Georgia Railroad and Banking Company an execution for taxes for the year 1875, for the sum of seventy six thousand eight hundred and four dollars and seventy-two cents (\$76,804.72) alleged to be due from the said company, in the county of Richmond, and said company is about to file its affidavit of illegality to stop the proceeding of said execution.

Now if the Georgia Railroad and Banking Company shall pay said execution so issued for taxes, in case it shall be ultimately adjudged by the courts having jurisdiction of said case, that it is liable to pay the same, then this bond to be void, else to remain in full force.

Signed and sealed in the presence of A. S. Morris, Notary Public, R. C., Ga.

Georgia Railroad and Banking Company, Per Jno. P. King, Pres't. Geo. P Butler, Cashier [L. S.] Jno. P. King. [L. S.] [fol. 92]

Atlanta, Ga., January 5, 1878.

To the Sheriffs and other legal officers of Georgia:

This is to certify that the Georgia Railroad and Banking Company has paid into the Treasury of Georgia, twenty-one hundred and twenty-eight 39-100 dollars (\$2,128.39) same being required by charter of said corporation as its tax on net earnings, for the year ending May 1, 1875, and which under the law, entitles said corporation to file affidavit of illegality to execution issued for said year.

W. L. Goldsmith, Comt. Gen'l.

IN FULTON SUPERIOR COURT, APRIL TERM, 1878

STATE OF GEORGIA

VS.

GEORGIA RAILROAD AND BANKING COMPANY

Fi. Fa. and Affidavit of Illegality

And now comes the plaintiff and demurs to all the grounds of illegality taken by the defendant and prays that the said affidavit of illegality be dismissed and the fi. fa. ordered to proceed on the following grounds;

1st. That said fi. fa. was issued and is proceeding regularly and lawfully to collect the taxes due the State from the defendant, and that none of the grounds of illegality taken by defendant are sufficient in law to arrest or prevent the execution of the same.

2nd. That the defendant not having paid the taxes due the State under her Charter has no status in this court, and no right to plead anything therein.

3rd. That the exemption claimed from taxation in the 15th Section of the Act of Incorporation in 1833 being matter different from the title of the act, is unconstitutional and void.

4th. That said Act of Incorporation gave no exemption to any part of said railroad or its branches, there being no negative words excluding taxing power; but if any exemption it extended to the road to Madison only and Athens, and that all the rest of the stock of said company is by the Charter and amendments subject to taxation at the pleasure of the Legislature, subject only to the restrictions of the organic law:

5th. That said exemption, if good, never exempted but \$1,500,000 of the stock of said road, and that all the rest of the stock, to wit: \$2,700,000 was at the passage of the act, and still is subject to taxation as well as all the bank stock, to wit: \$500,000 and all other property of said road except the said \$1,500,000 of stock under the said 15th section of said act. (Secact of 1833.)

6th. That the stock of the Warrenton branch of said — was never exempt from taxation (See act 22nd December, 1835).

7th. If the Georgia Railroad and Banking Company ever [fol. 93] had any exemption from taxation that exemption did not embrace the two millions of extra stock authorized by the act of 1847 amending its charter. (See act to incorporate the Savanna's and Albany Railroad and amend Charter of Georgia Railroad passed 25th December 1847) Pamphlet laws of 1847. (See also acts 20th December, 1849, and February 1st, 1850, when the stock above \$1,500,000 was expressly taxed)

8th. That by the act of 20th December, 1849° and 1st February 1850 all the increased stock of said read above \$1,500,000 was expressly subject to taxation by the State, and that without the acceptance of the act of 1849.

9th. That whatever exemption from taxation the Georgia Railroad and Banking Company ever had under her original Charter, and amendments up — the 21st July, 1852, was lost by the Act consolidating the Washington Railroad and Plank Road Company and Georgia Railroad and Banking Company.

Railroad and Banking Company and prescribing a limited rate of taxation upon its capital stock does not include the following property valued as follows, and owned by said road for the years 1875, 1876 and 1877, to-wit:—

For 1875

r or 18/5	
Real Estate / Banking house and lot	420 007 00
Material on hand for road	35,600.06
interest on bonds	19 700 00
Stock, Nashville & Chatt & St I onis De	
Rome Railroad	65,000.00
Rome Railroad Georgia Western R. R.	148,937.00
MACON AND AUDISIA REUROOM CO	
Saltimore and Chas. R. R. Ca and Stoneship	O 000 00
N. Y. and South Carolina Steam Ship	Co. 5,000.00
Donds Macon & Brungwick R. D. C.	
Bonds East Tenn. & Ga. R. R. Co.	12,750.00
Donus Western Rellroad of Alahama	
Bonds Baldwin County	61,100.00
Bonds City of Macon	33,000.00
Bonds Port Royal Railroad Co.	18,000.00
Western Railroad Company of Alabama	
Note of Western Railroad Co of Alaba	236,676.56
Macon & Augusta Railroad Company	na 20,000.00
a Hagasta Rainoad Company	142,016.27
For the Year 1876	-0
Real Estate	\$33,557.30
Banking house and lot	35,000.00
Materials on hand for road	59 063 60
Interest on bonds	39,060.00
	05,0.0.00
[fol. 94] Stocks	
18,000 shares Nashville & Chatt. & St. Louis R.	R. 65,000.00
1) 100 /8 Shales home Kallroad Co	900 000 00
2,000 bonds Macon & Anonsto R R Co	10,000.00
400 bonds N. Y. and S. C. Steamship	20,000.00
	20,000.00
Bonds 15 Macon & Brunswick R.R. Co.	
15 Macon & Brunswick R.R. Co.	#10.750.00
70 Western of Ala Railroad Co	. 412,100.00
5 East Tenn. & Ga. Railroad Co. 10 City of Athens	61,109.00
9 City of Macon 66 Baldwin County	1,000.00
66 Baldwin County Western Railroad of Ala., ½ interest Macon & Augusta Railroad Co	9,000.00
Western Railroad of Ala 1/2 interest	250 100 51
Macon & Augusta Railroad Co.	105 000 10
Port Royal Railroad Co.	
The state of the s	98,417.93

For the Year 1877

Real estate	
Real estate Banking house and lot Materials on hand for road Interest on bonds	\$32,940.60
Materials on hand for and	. 35,000.00
Interest on hands	52,259.11
Interest on bonds	37,520.00
Stocks	
18000 shares Nashville & Chattanooga & St	
Louis R. R. 1,489% shares Rome R. R. Co. 200 shares Macon & Augusto B. I.	dies one ca
1,489% shares Rome R. R. Co	100,000.00
THE PROPERTY OF THE PROPERTY O	40 000 00
400 shares N. Y. and S. C. Steamships	10,000.00
C. Steamships	20,000.00
Bonds	
70 Western Railroad of Ala.	
66 Baldwin County	\$61,100.00
66 Baldwin County 15 Macon and Brunswick R. R. Co.	33,000.00
9 City of Macon Co.	12,750.00
10 City of Athons	9,000.00
9 City of Macon Ga. 10 City of Athens 1 East Tenn. and Ga. R. R.	1,000.00
- Land Lenn, and Ga. N. N.	510.00
Western R. R. of Alabama, purchase account	301,005.81
Coupons paid as Guarantor Macon & Augusta R. R.	
	249,405.54
Western R. R. of Alabama coupon account Port Royal Railroad Co.	83,670.00
Low Royal Railroad Co.	137,472.20

All of which will more fully appear by reference to extracts from the annual reports of said Georgia Railroad and Banking Company read in evidence and for which said amounts said Georgia Railroad and Banking Company is liable to the State for taxation under the acts of the Legislature of 1875, 1876 and 1877.

[fol. 95] 11th. Said Georgia Railroad and Banking Company is liable to taxation to the State from its Banking operations on the following amounts of discounted paper due said company, to wit; for 1875, \$393,605.94; 1876, \$137,234.11; 1877, \$116,103.88.

12th. The stock of the Washington Branch Railroad, after having been consolidated with the Georgia Railroad and Banking Company, is liable to taxation by the State under the acts of 1875, 1876 and 1877.

13th. Said Georgia Railroad and Banking Company is liable to taxation for its undivided one half interest in the Western Railroad of Alabama situated and built within the limits of the State of Georgia.

14th. That said Georgia Railroad and Banking Company have not paid the tax required by law under the acts of 1875, 1876 and 1877 upon the capital stock of \$44,000 upon which they were adjudged liable in 54 Georgia Reports.

Rob't N. Ely, Att'y Gen'l for the State. R. Toombs.

STATE OF GEORGIA

GEORGIA RAILROAD AND BANKING COMPANY

Illegality to Tax Fi. Fas. 1876, 1877, and 1875

It is agreed that all questions of fact, as well as law, involved in said cases be submitted to his Honor, W. L. Grice, Judge Superior Court, Macon Circuit, presiding without the intervention of a jury, with the right to either party to carry the same to the Supreme Court; and that said cases be consolidated and tried together.

July 1, 1878.

J. B. Cumming, McCay & Trippe and Henry Hillyer, Defendant's Attorneys. Rob't N. Ely, Attorney General.

Agreed to: W. L. Grice, Judge Presiding.

It is ordered that the within agreement be entered on the minutes of the Superior Court of Fulton County, nunc pro tune, as of the date July 1st, 1878.

Rich'd H. Clark, Judge C. C. A., Presiding.

[fol. 96]

STATE OF GEORGIA

GEORGIA RAILROAD AND BANKING COMPANY

The above stated case having by consent of counsel been referred to my decision and judgment upon both the law and facts:

It is ordered, considered and adjudged that the demurrer be overruled, that the defendant has a standing in court,

and that the execution was issued illegally, and is proceeding illegally protanto, as indicated hereinafter, and that the affidavit of illegality be sustained to that extent and over-ruled; to the remaining part of it, I hold and decide upon the case now made, that the exemption from taxation given in the original charter continue as held in 54 Georgia Reports, upon all property necessary for the purpose of the incorporation. I further decide that the stock in incorporate companies situate outside of this State and held by the road is not taxable. The proof shows that the road owns real estate and a banking house which is subject to an unpaid tax for the years 1875, 1876 and 1877. Two hundred and ninety one and sixty-six hundredths dollars for each of the years 1875, 1876 and 1877 and from the proof submitted I am unable to determine whether the company owns any other property which is liable to tax and on which the tax has not been paid, and I make no determination on any property except that specified. illegality is therefore sustained as to all of said execution except the said sum of \$291.66 on one of the executions for each of the years 1875, 1876 and 1875 and they are ordered to proceed for this amount and no more, and it is further ordered that this judgment is not to be taken as an adjudication of the right of the State to proceed hereafter to collect any tax that may be due for any of said years in the other property mentioned in said demurrer, owned by the company, except that in the items of real estate and banking house.

July 6, 1878.

W. L. Grice, Presiding Judge.

Clerk's Office, Superior Court of Fulton County Atlanta, Ga., July 23d, 1878.

I hereby certify, That the foregoing pages, hereto attached, contain a true and complete transcript of the record in the case of The State of Georgia, plaintiff in error, vs. Georgia Railroad and Banking Company, defendant in error.

I further certify, That the Spring Term of said Court, at which said case was tried, adjourned Monday July 15th, 1878. All of which appears from the Record and Mmutes of said Court.

Witness my signature and the seal of said court, affixed the day and year first above written.

James D. Collins, Clerk Superior Court,

THE GEORGIA RAILROAD AND BANKING COMPANY By the Court:

- 1. That the limit on the taxing power of the State over the Georgia Railroad and Banking Company, is not expressed or indicated in the title of the act of incorporation, does not render that provision of the charter unconstitutional.
- 2. The limit on the taxing power extends to all the capital of said company, except so much thereof as was issued under the amendment of 1868 authorizing the Clayton branch, 54 Ga., 423. The correct mode of taxing the company's property under existing laws is to estimate all its property at its true value, just as if it belonged to a natural person, and upon so much of this value as equals the amount; of the whole capital stock other than that issued for the Clayton branch, assess at the charter rate, (that is, at such percentage as will yield a revenue to the State equal to one half of one per cent, on the net annual proceeds of all the company's investments); and upon the balance of such value, if any, assess at the general rate. If, however, the charter rate thus arrived at should exceed the general rate, then assess at the latter upon the whole value, as in no case is the general rate, that is, the rate all valorem imposed upon property generally, to be exceeded.
- 3. Affidavit of illegality is not a remedy provided by law for resisting a fi. fa. issued by the Comptroller-General for the taxes of a railroad company, except where the assessment and fi. fa. are based upon a return of property made by the company for the given year. If the Comptroller-General, for the lack of the proper annual returns of the company's property, has proceeded against the company as a defaulter, assessing both tax and penalty, there may be a remedy in Equity by injunction, but the remedy at law provided by the act of 1874 as modified and continued in force by subsequent acts, does not apply.

BLECKLEY, Justice:

1. The title or caption of the act of incorporation was sufficient, for the reasons given in the Rome Railroad case, decided at the present term.

2. It seems to have been the purpose of this court to hold in 54 Ga. 423, that except as to stock issued under the amendment of 1868, authorizing the Clayton branch, the limit put by the charter of the Georgia Railroad & Banking Company upon the taxing power, extends to all the capital stock of the corporation as a railroad company, and is irrepealable. These questions were fairly involved in that case, and the adjudication of them there announced ought to be accepted as final. It does not follow, however, that the court's attention was called to the distinction between [fol. 98] a tax levied directly upon stock, and a tax levied upon the property of the corporation, as to the excess in value of the property over and above the capital stock authorized by the charter and its amendments, and issued accordingly. To a kindred subject the court's attention was called, and upon it a ruling was made, namely; that the reduced rate of the charter would be restricted to the value of the road and its necessary appurtenances, and that any surplus capital kept on hand, or any investment not strictly within the enterprise contemplated in the charter, would be taxable at the general rate. This is taking a look at the property, as distinguished from stock, and the point of view is quite proper; but to arrive at the right mode of taxing the Georgia Railroad and Banking Company under existing laws (the charter provisions included) a further comparison is to be made, the amount of the stock is to be compared with the value of the property. There is a legislative longing to tax railroad property just as other property is taxed, and this is obviously a right direction for the legislative mind to take. Taxation ought to be uniform and impartial. The accident that capital is invested in this or that species of values ought to make no difference, except so far as the State's autonomy is fettered by contract. Though the power of taxation is conceded to be an attribute of sovereignty, it may, in respect to a given property or subject matter, be surrendered or limited by contract. Strange as this doctrine is in itself, and strange as it will probably seem to our posterity, it is, for the present, law in these states, and the courts of this generation must administer it.

The contract with the Georgia Railroad & Banking Company fixes the amount of the capital stock of the corporation, or provides for fixing it, and then stipulates that the stock. shall not be taxed beyond a certain limit. By this the State meant that so many dollars of wealth might be and remain subject to the restricted taxation; it did not mean that what that wealth might produce by way of appreciation of property in which it was invested, or by way of accumulated profit, should also be taxed as capital, and only as capital. The language of the fifteenth section of the original charter is as follows; "The stock of the said company and its. branches, shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads or any of tuem; and after that, shall be subject to a tax not exceeding one half per cent. per annum on the net proceeds of their investments." We have no doubt that "one-half per cent." means one-half of one per cent. The existing laws do not tax stock as such, but they tax property ad valorem, and they seek to tax railroad property with no discrimination for or against it. The stock of the Georgia Railroad & Banking Company, in so far as the corporation, is a railroad company, (not a bank) is subject to a restricted taxation as to all stock authorized and subscribed prior to the adoption of the Code, January 1st, 1863, and this limit in date comprehends all stock except that issued by virtue of the amendment to the charter authorizing the Clayton branch. Now, stock and property ought to off set each other, dollar for dollar, so far as they both extend, pari passa; but as the excess of stock over property would not be taxed by a tax levied exclusively upon property, so a tax [fol. 99] upon the excess of property over stock is not a tax upon the stock. The rule of strict construction should be applied in administering the provision of the charter for restricted taxation. To the extent of the stock at its nominal amount the provision must be respected, but the excess of property over that amount represents appreciation and accumulation, not stock, and is taxable at the general legal rate. In the second head-note, we have indicated with as much accuracy as possible the proper mode of taxing this corporation under existing laws. Though it has banking powers, the corporation is primarily and pre-eminently a railroad company and its property as a bank should be estimated for taxation with its other assets. The banking powers, as now existing seem to depend upon an act passed

in 1870, and are therefore modified by the general provisions of the Code: As a bank, therefore, the corporation is not beyond the unrestricted taxing power of the State. But considered merely as a bank, its capital is non-taxable by reason of the act of 1876, which forbids any assessment whatever from the capital of any bank, and provides for taxing the stockholders on their shares of stock. There is a difficulty in applying this mode of taxation to a railroad company with banking powers, where the stock for banking and the stock for railroad operations are blended and consolidated in ownership, that is, where there is no separation of bank shares from railroad shares. The best solution of the difficulty seems to be to keep sight of the main characteristic of the corporation, and to treat the railroad side, (which in the case of this company predominates in so high a decree), as swallowing up the banking side. It is really the case of a railroad company owning a bank, and not that of a separate banking corporation owning a bank. The bank assets may be treated as a mere investment of the railroad corporation to the extent of their value, and taxable the same as the railroad and its appurtenances, or as other property held in excess of the whole capital stock. It may be worth while to explain, that the reason why we do not think there is a limit of the restricted taxation to stock actually paid in, as we rule there was in the case of the Rome Railroad Company, is owing to there being nothing said in the Georgia Railroad charter on the subject, in the taxation clause, and no reference hade to other legislation which embodies that limitation. In fixing the amount of the Georgia Railroad stock, the amount of stock issued and outstanding is to govern, so that it be not in excess of the amount authorized by the charter and the amendments thereto. And it is to be remembered, also, that amounts authorized since the Code went into effect are not to be counted in any estimate for restricted taxation. This results from the settled rule that restrictions are repealable if they do not antedate the Code; and the railroad tax act of 1874 repeals, whatever of exemption or restriction is repealable. We will not undertake now to determine what particular assets of the Georgia Railroad are taxable, further than we have indicated in the second head note. Let the property of the company be treated, in the first instance, just as if it belonged to a natural person. Then, if the valuation exceeds the capital stock to which restricted taxation applies, let the excess be rated

[fol. 100] as if it belonged to a natural person. This rule is simple and easy, and we suppose there will be no serious difficulty in carrying it but. First administer the charter so far as the restricted rate goes, and then, as to the balance of the property, administer the general tax law.

3. But whether the corporation has been overtaxed or not, the court erred in the disposition made of the case. The affidavit of illegality ought to have been dismissed, for there is no law giving jurisdiction of that remedy, under the facts in the record. Affidavit of illegality is not a remedy provided by law for resisting a fi. fa. issued by the comptroller general for the taxes of a railroad company, except where the assessment and f. fa. are based upon a return of property made by the company for the given year. The statute requires a return to be made for each year; and certainly the legislature has power to exact such a return. Why should not railroad companys make, each year, the returns which the law requires them to make? What has exemption from taxation or restrictions upon the taxing power to do with the duty of making returns? Let the returns prescribed by statute be made, and the State can and will still abide by its obligations in respect to the imposition of taxes. No company can be allowed to absolve itself from the duty of making returns. In the present instance, the Comptroller-General was left to grope in the dark as to the Company's assets. The scheme of the statute is not to leave both law and fact open; but to settle the facts by a return, and then let the company raise the question of law by affidavit of illegality. There is no presumption of law, certainly none in direct opposition to the statistory requisites for a return, that the property remains the same, or of the same value, from year to year, and for every year after the first return is made. If a company wants to avail itself of a statutory remedy, it must comply with the terms laid down in the statute. The general rule is non-intervention by the courts in the collection of taxes. By special statute, railroad companys may resort to an affidavit of illegality, but the same statute requires that they shall make a return and it points out what the return shall contain. The Georgia Railroad and Banking Company did not comply with this statute, and therefore it has no right to prosecute an affidavit of illegality, and the Superior Court of Fulton county has no power to entertain the affidavit. We accordingly reverse

the judgment, with direction that the affidavits of illegality be dismissed for the want of jurisdiction in Fulton Superior court, on the facts apparent in the record. There may be a remedy in equity by injunction, but that question is open, no bill having been filed.

Judgment reversed.

THE STATE OF GEORGIA

US.

THE GEORGIA R. R. & BKG. Co.

This case came before the court upon a transcript of the record from the superior court of Fulton county, and after argument had it is considered and adjudged by the court [fol. 101] that the judgment of the court below be reversed, with direction that the affidavit of illegality be dismissed for the want of jurisdiction in Fulton superior court on the facts apparent in the record.

THE GEORGIA R. R. & BKG. Co.

vs.

THE STATE OF GEORGIA

This case came on before the court upon a transcript of the record from the superior court of Fulton county, and after argument had it is considered and adjudged by the court that the judgment of the court below be reversed, with direction that the affidavit of illegality be dismissed for the want of jurisdiction in Fulton superior court on the facts apparent in the record.

CLERK'S OFFICE,

SUPREME COURT OF GEORGIA, January 8, 1908.

I hereby certify that the foregoing 29 pages contain a true copy of the fi. fa. for taxes of 1875, the illegality filed thereto, the consolidation thereof with two other similar cases, the demurrer to the illegalities, the decision of the trial court, and the decision of the Supreme Court, as the same appear upon the records of this court in the cases of the State of Georgia vs. Georgia Railroad and Banking Company and Georgia Railroad and Banking Company vs. State of Georgia being bill and cross bill, said cases reported in 62 Ga. Rep.

p. 485 et seq. as appears from the records and files of this office.

Witness my signature and the seal of the Supreme Court attached, the day and year first above written.

W. E. Talley, Deputy Clerk, Supreme Court of Georgia. [Seal Supreme Court of Georgia.]

Filed in Clerk's office anuary 10, 1908.

O. C. Fuller, Clerk, By W. C. Carter, Deputy.

Circuit Court of the United States, Northern District of Georgia. In Equity

THE GEORGIA RAILROAD AND BANKING COMPANY

vs.

WM. A. WRIGHT DT AL.

The attached record was considered, though not at the time actually filed, as an exhibit to the bill of complaint of the Georgia Railroad and Banking Company, in support of its contention that the exemption from taxation claimed by complainant was res judicata.

[fol. 102] It is stipulated and agreed that said record be now filed and be transmitted as part of the pleadings in this case to the Supreme Court of the United States.

Jos. B. Cumming, Solicitor for the Georgia Railroad and Banking Company. Jno. C. Hart, Sam'l H. Sibley, Solicitors for Wm. A. Wright. Ligon Johnson, For County of Wilkes & Taliaferro.

Transcript of Record, State of Georgia vs. Ga. R. R. & Bk. Co.

THE STATE OF GEORGIA.

vs,

THE GEORGIA RAILROAD AND BANKING COMPANY.

Illegality Against Tax Fi. Fa. Issued by the Comptroller-General of Georgia.

During the fall term, 1874 of the Superior Court of Fulton County, Georgia said cause came on to be heard before the Honorable Jno. L. Hopkins, Judge of the Superior Courts of the Atlantic Circuit, upon agreement of counsel that said Judge should decide the same "as to law and facts, without a jury, subject to review as in other cases."

Said defendant put in evidence its charter asserted to on the 31st of December, 1833 (See Pamp. Acts 1833 p. 258) the material parts of which in this case, are as follows:

It is "An act to incorporate the Georgia Rairoad Company with powers to construct a rail or turn pike road from the city of Augusta, with branches extending to the towns of Eatonton, Madison, in Morgan County, and Athens, to be carried beyond those places, at the discretion of the said company, to punish those who may wilfrlly injure the same, to confer all corporate powers necessary to effect said object," and to repeal a certain act passed 27th December 1831.

It provided generally for the organization of the company, procuring subscriptions for stock, securing rights of way, election of officers, purchasing and having a holding in fee simple or for years, to them and their successors, any lands, tenements and hereditaments" &c. which they might find necessary, gave them "at all times the exclusive right.of transportation or conveyance of persons, merchandise and produce over said railroad or railroads", while they see fit to exercise the exclusive right provided they charge no more than certain limited rates (§12), gave a remedy against obstructing or injuring said road, and gave them the right to farm out said road to others. The fifteenth section of said act of 1833 was in these words: "Be it enacted by the authority aforesaid, that the exclusive right to make keep up, and use the railroads and transportations authorized by this act shall be for and during the term of thirty-six years, to be computed from the time when said road from Augusta to either of the points herein before designated [fol. 103] shall be completed for transportation; provided that the subscription of stock or shares of said company to the amount of at least five thousand shares, as aforesaid, be filled up within six months from the passing of this act, and the work from or between Augusta and either of the places hereinbefore first mentioned be commenced within two years, and be completed within six fears after the five thousand, shares shall be subscribed. And after said-term of thirty six years shall have elapsed, though the legislature may authorize the construction of other railroads for the trade and .

intercourse contemplated herein; nevertheless the Georgia Railroad Company shall remain and be incorporate, and vested with all the estate, powers and privileges as to their own works herein granted and secured, except the exclusive right to make, keep and use railroads over and through such parts of the country that shall have expired by the foregoing limitations, but the legislature may review and extend the exclusive right upon such terms as may be prescribed by law, and be accepted by said incorporated company. The stock of said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads or any one of them; and after that shall be subject to a tax not exceeding one half per cent. per annum on the net proceeds of their investments."

The twenty-third section repealed said act of 27th of December, 1831, and enacted that "This act of encorporation shall be deemed and taken to be a public act, and shall be judicially taken notice of as such, without special pleading. They further shows that on the 18th December 1835 (Pamp. 1835 p. 180) the General Assembly passed an act amending said charter by changing its name to the Ga. R. R. & Bkg. Company, providing "that the stock of said company shall consist of two million of dollars, one fourth of which append to banking purposes shall be gold and silver coin in shares of one hundred dollars each, of which capital one half may be used for banking purposes" until completion of the road to Athens &c., with privilege then to use more for banking. That the banking privilege should continue twenty five years from the completion of the Union Road, and that the act of which this is an amendment shall "remain in full force and effect in every section and clause thereof except where it conflicts with this act."

And further that on the 25th of December, 1847 (Acts of 1847 p. 192) said company was authorized to increase its capital to four million of dollars; but not to increase the banking capital. And that by further amendment on the 21st of January, 1852 it was allowed to consolidate with the Washington Rail or Plankroad Company. Defendant showed payment of the one half per cent. tax, as averred. Here defendant closed.

The defendant's counsel admitted that said defendant has accepted the amendments passed October 5th. 1868 (Acts

of 1868, p. 147) and 4th of February 1873 (Acts of 1873-p. 37) and Acts of 19th of October, 1870 (Acts of 1870, p. 106-7) and that under and by authority of said act of 1868 said defendant increased its capital stock by selling 440 shares, which were worth on the 1st of April 1874, ninety-three dollars per share. Said amendments were as follows:

[fol. 104] An Act to increase the capital and define the powers of the Georgia Railroad and Banking Company.

Whereas, in the original charter of said Georgia Railroad & Banking Company (then known as the Georgia Railroad Company) it is provided that said company shall have the power to continue the Athens branch towards any point which may be agreed upon on the Tennessee River; and by the amended charter of said company, passed December, 1835, it is provided that the continuation of said road beyond Athens, so as to connect with the Cincinnati Road, shall be steadily prosecuted as soon as the Company shall have satisfactory evidence that the said connection can be formed; and whereas reasonable hopes are now entertained that said Cincinnati Road will be finished to Clayton at no distant day;

Section 1. Be it therefore enacted by the Legislature of the State of Georgia in General Assembly met, That the Georgia Railroad & Banking Company have the right to extend their road from or near the city of Athens to the town of Clayton, in Rabun County, and for that purpose the said company shall have and enjoy all the powers and privileges of the original charter, and amendments.

Section 2. For the purposes stated in the above section, the said company may increase its capital in such form, and upon such terms as the board of directors may determine, provided said increase shall not exceed two million dellars.

Section 3. That said company may lean, on ifterest, any surplus earnings on hand, or which may be deposited by others; provided, not exceeding 7 per cent. interest or discount shall be charged, with the usual rate of exchange on bills drawn on distant points.

Section 4. Repeals conflicting laws.

Approved October 5th, 1868.

An Act to extend, continue and renew the banking privileges of the Georgia Railroad & Banking Company of Georgia.

Section 1. Be it enacted etc. That the banking powers and privileges heretofore granted to the Georgia Railroad & Banking Company of Georgia, by an Act approved December 18, 1835, and the various acts amendatory thereof are hereby continued, renewed and extended for a further term of thirty years.

Section 2. Be it further enacted, That all laws and parts of laws militating against the provisions of this act be, and the

same are hereby repealed.

Approved October 19, 1870.

An Act to amend the charter of the Georgia Railroad & Banking Company as to legalize certain aid extended by it to the Port Royal Railroad Company.

Section 1. The Generall Assembly of the State of Georgia do enact, That from and after the passage of this Act, the action of the stockholders and board of directors of the Georgia Railroad and Banking Company, in aiding the ob[fol. 105] jects of the incorporation of the Port Royal Railroad Company in this state, and in the State of South Carolina, by placing of the indorsement of the former company upon the bonds of the latter company, to the amount of five hundred thousand dollars, upon the terms agreed upon by both companies, be and the same is hereby legalized and recognized as binding upon the said companies, and all parties concerned, with all the terms and conditions of said contract in the same manner and to the same effect as if originally anthorized by law.

Approved February 4, 1873.

Here the evidence closed.

After argument had the court sustained said oath of illegality as to all the tax claimed, except the tax upon said four hundred and forty shares of new stock, and counsel for the State then and there excepted.

And now during said term of said court comes the counsel for the State and tenders this its bill of exceptions, and says that the court erred in holding that said exemption in such charter was not repealed by said tax act of 1874; and that as applied to this case and judgment thereon the tax act of 1874 violated the obligation of the contract between the State and

said defendant; in holding that said exemption was still of force, and constituted a contract which the State could not repeal, and in restricting the fi. fa. as he did by said judgment.

And as the facts aforesaid do not appear of record counsel for the State pray that this, its bill of exceptions, may be certified as required by law, that the errors complained of may be considered and corrected.

N. J. Hammond, Att'y Gen'l; R. Toombs, For State.

STATE OF GEORGIA, Fulton County:

And now comes the Georgia Railroad and Banking Company, by its said attorneys, and on its part excepts to said judgment in so far only as the same requires said tax to be paid on said four hundred and forty shares of new stock, not complainaning of the remaining and other effect of said judgment, and this defendant says the court erred in deciding that the act of the Legislature of Georgia approved February 28, 1874 entitled an act to amend the tax laws of this State so far as the same relate to railroad companies. and to define the liability of such companies to taxation, and to repeal so much of the charters of such companies as may conflict with the provisions of this act, is a valid act, and not in conflict with the constitution of the United States, which declares in the tenth section of the first article thereof that "no State shall pass any law impairing the obligation of contracts," not only so as to protect old strck of said company from such taxation, (which the court did hold), but newpstock also; and second that the court erred in holding that said tax was lawfully assessed on said 440 skares of new stock, and in ordering that said fi. fa. proceed for the collection of the sum of two hundred and four 50/100 dollars, or [fol. 106] for any sum. But this defendant here protests that the question of whether the act of 1835, fixes the amount of defendant's capital employed inchanking was not passed upon by the court. The act of 1835 was not read to the court, and the point was not made in the cause. #And the defendant here excepting, as aforesaid, does so as to the recitals in said bill of exceptions above set forth, with the qualification that when tendered to the judge the same remain sube ject to his approval and certificate.

#And defendant denies that any part of its capital was or is so employed, or that there was any proof of the same. # The more in margin marked # is added before signing. W. H. Hull, Hillyer & Bro., Def'ts Att'y

Note.—In passing upon the case I did not consider the

act of December 17th, 1835. Something was said in the argument about the capital used for banking purposes, but must it was, I do not remember. I can not say, that that act, was, or was not, put in evidence.

John L. Hopkins, Judge.

As modified by the note.

Georgia, Fulton County:

I do certify that the foregoing bill of exceptions is true, and contains all the evidence material to a clear understanding of the errors complained of; and the clerk of the Superior Court of the County of Fulfon is hereby required and ordered to make out a complete copy of the record of said case, and certify the same as such, and cause the same to be transmitted to the January Term 1875 of the Supreme Court, that the errors alleged to have been committed may be considered and corrected.

Signed by me officially this 21st day of December 1874:

Jno. L. Hopkins, Judge Superior Court, Atlanta Circuit.

We hereby consent that the exceptions taken by each party may be heard under this bill of exceptions and in case either party should withdraw its bill of exceptions the other shall stand as to the errors complained of by the party not withdrawing. We not unally acknowledge service and waive copies, and we waive paying costs and superscdeas bonds in like manner, Dec. 21, 1874.

W. H. Hull, Hillyer & Bro., Def'ts Att.; N. J. Hammond, Att'y Gen'l for State.

(Endorsed:) No. — Supreme Court of Georgia, January Term, 1875. The State of Ga. vs. The Ga. R. R. & Bankg. Co. From Fulton County Original Bill of exceptions, Filed in Office, 21st., Dec. 1874. J. D. Collins, C. S. C. N. J. Hammond, Att'y Gen'l R. Toombs. [fol. 107] GEORGIA, Fulton County:

I, Jas. D. Collins, Clerk of Superior Court, in and for said county do certify that within and foregoing is a true, original bill of exceptions, in case of State of Georgia vs. Georgia R. R. & Bkg. Co., as appears of file, and that said court is now in session.

Given under my hand and seal of office this December 23,

1874.

Jas. D. Collins, Clerk. (Seal.)

(Endorsed:) No. 24 Atlanta. Supreme Court of Georgia. January Term, 1875. Atlanta Circuit. McJ. R. June 20, 1875. State of Georgia, Pl'ff in Error, vs. Ga. R. R. & Banking Co. Bill of Exceptions. Filed in office Dec. 24, 1874. Z. D. Harrison.

Comptroller General's Office.

State of Georgia, Fulton County to all and singular the sheriffs and other lawful officers of this State:-

You are hereby commanded that of the goods and chattels, lands, tenements and franchises of the Georgia Railroad & Banking Company, a corporation of this State, you cause to be made the sum of twenty three thousand eight hundred and two 07/100 dollars as its tax for the year 1874 assessed against it upon a return of its taxable property, according to law, and that you pay over said sum of money to the Comptroller-General of said State, at his office in Atlanta, Georgia and return thereto this fi. fa. with your actings and doing-entered thereon.

Witness W. L. Goldsmith, Comptroller-General of said

State under the seal of said office.

Issued this 2d day of October, 1874.

W. L. Goldsmith, Comptroller General of Georgia.

Levied this fi. fa. on the house and lot in the city of Atlanta, known as the depot building and grounds of the Ga. Railroad & Banking Company, surrounding the same, situated on the corner of Alabama and Loyd Streets, containing six acres more or less, as the property of the Georgia Railroa and Banking Company, October 3rd, 1874.

A. M. Perkerson, Sheriff.

Received of Hillyer & Bro. Five 50/100 dollars in full nost in this case to date, Oct. 9th, 1874.

A. M. Perkerson, Sheriff.

STATE OF GEORGIA:

Comptroller-General's Office, Atlanta, Ga., Oct. 6, 1874.

This is to certify that the Georgia Railroad and Banking Company has paid tax on its net income for the year 1874 W. L. Goldsmith, Comptroller-General.

[fol. 108] Comptroller-General Execution for Taxes

THE STATE OF GEORGIA

VS.

THE GEORGIA RAILROAD AND BANKING COMPANY

No. 6 Fi. Fa. Issued Oct. 2, 1874. Principal, \$23,802.07.

The above described fi. fa. levied by the sheriff of Fulton County on the following property of the defendant, the said Georgia Railroad and Banking Company to wit, the house and lot in the city of Atlanta known as the Depot Building and grounds of the Georgia Railroad & Banking Company, surrounding the same, situated on the corner of Alabama and Loyd streets, containing six acres more or less, as the property of the Georgia Railroad & Banking Company. Levy dated Oct. 3rd, 1874, and signed by A. M. Perkerson, sheriff as aforesaid.

And now comes the defendant in said fi. fa. The Georgia Railroad and Banking Company, and says that said fi. fa. levied as above stated is proceeding illegally because it says that the charter of the corporation of this defendant was granted by a public act of the Legislature of Georgia, approved December 21, 1833 by which act in the 13th section thereof it is provided and declared that the stock of said company and its branches shall be subject to a tax not exceeding one half per cent. per annum on the net proceeds of their investments.

And the stock of this defendant was subscribed under said charter, and on faith of its provisions, and the corporators accepted said act of incorporation and organized under the same, and expended the stocj of the company subscribed and paid in by the stockholders in the construction and equipment of said road and branches, and the said provision in said charter has never been repealed or changed by the consent of this defendant. But this de-

fendant has constantly used, enjoyed and exercised the rights, franchises and immunities granted them by their said charter until the passing of the act in this illegality hereinafter complained of and ever since, unless prevented by said act and the proceeding under the same. And the defendant further says that all the property of this defendant on which said tax is assessed on which said fi. fa. is issued is property in which the capital stock of defendant has been invested and constitutes and is the stock of said company and its branches, and the tax so assessed is a tax on said stock, and far exceeds the amount of one half per cent. per annum on the net proceeds of their investments, which last named amount tax year is two thousand six hundred and ninety eight dollars and twenty five cents which this defendant has already paid to the Comptroller-General of the State.

And this defendant further says that there is no valid law of said State under which said tax fi. fa. is issued and that the act of the Legislature approved February 28, 1874 entitled "An Act to amend the tax laws of this State so far as the same relate to railroads companies, and to define the liability of such companies to taxation, and to repeal so much of the charters of such companies respectively as may [fol. 109] conflict with the provisions of this Act" is void and of no effect in so far as it attempts to repeal any portion of flie charter of this defendant, or to impose other and greater tax than one half per cent. per annum of the net profits of this defendant's investments on the stock of this defendant, or the property in which said stock is invested, because said act is in conflict with the constitution of the United States as being an act impairing the obligation of a contract and therefore violation of the first paragraph of the tenth section of the first article of said constitution.

W. H. Hull, Hillyer & Bro., Def'ts Attorneys.

Georgia, Richmond County:

You Jno. P. King President of the Georgia Railroad & Banking Company do swear that the acts stated in the above and foregoing affidavit of illegality are true.

Jno. P. King.

Sworn to and subscribed before me this 20th day of October 1874.

Jno. M. Taliaferro, Notary Public, R. Co., Ga.

STATE OF GEORGIA, Richmond County:

Know all men that the Georgia Railroad & Banking Company as principal and Jno. P. King as security are held and firmly bound unto the Governor of the State of Georgia and his successors in the sum of fifty thousand dollars for the payment of which they bind themselves by these presents.

In witness whereof the said company hath caused these presents to be signed by its president and countersigned by its cashier, and sealed with its corporate seal, and the said security hath set his hand and seal this 20th day of October 1874.

The condition of this obligation is that whereas the Comptroller-General of the State of Georgia hath issued against the said Georgia Railroad & Banking Company an execution for taxes for the year 1874, for the sum of twenty-three thousand eight hundred and two dollars and seven cents alleged to be due from said company, and the same has been levied on property of the said company in the county of Fulton, and said company is about to file its affidavit of illegality to stop the proceeding of said execution.

Now if the said Georgia Railroad & Banking Company shall pay said execution so issued for taxes in case it shall be ultimately adjudged by the courts having jurisdiction of said case that it is liable to pay the same, then this bond to be void, else to remain in full force.

Jno. P. King, P't. Ga. R. R. & Bkg. Co. Jno. P. King, (L. S.)

J. A. Milligan, Cashier. (Seal G. R. R. Co.) Signed and sealed in presence of Geo. P. Butler, Notary Public, R. Co., Ga. 10—268

[fol. 110] · Illegality in Fulton Superior Court

THE STATE OF GEORGIA

VS.

THE GEORGIA RAILROAD & BANKING CO.

It is admitted that the board of directors of the Georgia R. R. & Bkg. Co. by authority of referring to the act of Oct. 5, 1868, found on page 147 of the Acts of that year veted to increase the capital stock by four hundred and forty

shares, and that number of additional shares was sold, the value of which on the 1st of April, 1874 was ninety-three dollars per share. Also that the said board of directors declared their acceptance of the act of February 4, 1873, found on page 97 of the acts of that year. Also that said board, by resolution, declared their acceptance of the act of October 19th, 1870, found on pages 106-7 of the acts of that year, and that the company has done banking business under said last named act. All of which admissions may be used in the case above stated.

W. H. Hull, Att'y for Said Ga. R. R. & Bkg. Co.

We agree that this case be now decided by Hon. Jno. L. Hopkins, Judge of the Superior Court of Fulton County as to law and facts, without a jury, subject to review in other cases.

This 14 Dec. 1874.

N. J. Hammond, Att'y Gen'l. R. Toombs, For State. W. H. Hull. Hillyer & Bro., Att'y for Def't.

After argument had it is ordered and adjudged that the oath of illegality be sustained as to all tax claimed except the tax upon four hundred and forty shares of new stock, valued at ninety-three dollars per share, being the sum of two hundred and four 50/100 dollars, and that the fi fa. proceed to collect said last named sum, and the further sum of — for costs.

This 17th December, 1874.

N. J. Hammond, Att'y Gen'l.

Georgia, Fulton County:

I, Jas. D. Collins, Clerk of Superior Court in and for said County do certify that above and foregoing is a true and complete transcript of the record in case of State of Georgia vs. Geo. R. R. & Bgk. Co., as appears of record, and that said court, is now in session.

Given under my hand and seal of office Dec. 23, 1874.

Jas. D. Collins, Clerk Superior Court. (Seal.)

[fol. 111] (Endorsed:) No. 24 Atlanta. Supreme Court of Georgia. January Term, 1875. Atlanta Circuit. State of Georgia, Pl'ff in Error, vs. Georgia R. R. & Banking Co. Copy of record. Filed in office December 24, 1874. Z. D. Harrison. N. J. Hammond. R. Toombs.

Supreme Court of Georgia, January Term, 1875

STATE OF GEORGIA, Plaintiff in Error

VS

THE GEORGIA RAILROAD & BKG. Co., Def't in Error.

By the Count:

1. By the original charter of the Georgia Railroad and Banking Company, it was, in terms, provided that "the stock of said Company and its franchises, shall be exempt from taxation for seven years from the completion of said railroads, or any one of them, and after that shall be subject to a tax of not exceeding one half of one per cent. per annum on the net proceeds of their investments."

Held: That under the settled rules of construction it was competent for the Legislature to grant this exemption, and forming as it does, a portion of the contract of incorporation, any repeal of it by the Legislature, without the consent of the corporation, is in violation of Art. 1, Section 10, par. 1 of the Constitution of the United States, prohibiting any State from passing any law impairing the obligation of contracts.

2. None of the Acts of the Legislature of this State which have been accepted by the Georgia Railroad and Banking Company rassed since the adoption of the Code, have brought said charter, so far as its investment in said road and its necessary incidents are concerned, within section 1636 of said Code of 1863.

3. The tax act of 1874 taxing the railroads of this State upon the property belonging to them, as other property of the citizens of this State is taxed, is, so far as the Georgia Railroad Company is concerned as to its railroad and appurtenances, unconstitutional and void.

4. Bonds and other property of said company not forming any part of said reilroad or its appurtenances, are subject to taxation as the appurent of the said reilroad or its appurtenances.

ject to taxation as the property of other citizens.

McCay, Judge, delivering the opinion:

Were this a new question I should not hesitate to hold that it was not competent for the General Assembly of this State to enter into any contract with the corporators of the Georgia Railroad and Banking Company to exempt the

corporation, permanently, from taxation, nor to fix a limit, beyond which the corporation should not be taxed. It a principle deducible from the nature of Legislative bodies, · that one Legislature cannot fix a limit to the Legislative power of another and subsequent Legislature. This only the people, in their sovereign capacity can do. This is the [fol. 112] object and function of the Constitution alone. If a new Legislative body can do this in one particular why may it not do so in another? If by a contract a Legislature may impose limits upon the power of a subsequent Legislature to tax, why may it not by contract, limit also its power to establish courts, regulate the mode of making private contracts, the making of wills; the descent of property, or any other of the Legislative duties, east by the Constitution upon this branch of the government, established to conduct the affairs of the State? The taxing power is especially a duty, which from the nature and necessity of it, it is of the utmost importance, shall remain to each Legislature intact, as the people have in their sovereign capacity seen fit to restrict it.

This power is the very life of the State, a necessity for its very existence, since it can never be known what the future may have in store, and if by a contract, a Legislature may stipulate that one man, or one corporation shall enjoy either an entire, or partial exemption from this necessary burden, where is the hindrance to the power of one Legislature to grant, by contract, this exemption to a set of men, to the landowners, the railroad proprietors, or indeed to any extent either of persons or property.

In the early history of this country, before the subject was fully understood, and especially before the Dartmouth College case, our Legislatures moulded as they were, upon the pattern of the parliament of Great Britain, were not so careful to scan the Legislation they adopted, knowing that if evil consequences to the State should ensue, it was competent for a subsequent Legislature to undo the knot, by

which the State was bound.

But under the disability the decision in the Dartmouth College case, puts upon the Legislative power, it now often happens that in a thoughtless hour the State, with but a nominal consideration is shorn of its most important perogatives.

It becomes, therefore, of the greatest importance to inquire if there be no limit to this capacity of one Legislature

to bind another. Is the whole power of the people, the vital existence of the State, its whole Legislative capacity, capable of being thus hampered, bartered away, sold to a corporation! Where is the limit! Or is there none! Can it be that under that clause of the Constitution of the United States, which forbids a State from passing any law impairing the obligation of a contract, a State Legislature has a power which enables it to put a final conclusive limit

to the Legislative power of its successors?

that the decisions of the Supreme Court of the United States upon it, which it is admitted are definite and decided, are not sustainable upon principle, and not in harmony with other well settled adjudications, involving a view different from that taken by that high tribunal. The Supreme Court of this State in Hambrick v. Rowe, 17th Ga. 56, held in solemn argument, that it was not competent for one Legislature to bind another, not to authorize the removal of a county seat, and in Daly v. Harris, 33rd Ga. (Supplement) no less a jurist and moralist than Judge Jenkins, says: governments are mere agencies, established [fol. 113] for the security of rights, and the promotion of interest appertaining to the founders, who by common consent have become the governed.

To this end they have been invested with certain necessary powers, the exercise of which devolves upon different individuals, which the course of time come successively in

the government.

If the depository of these powers for the passing hour may alien any one of them so as to deny itself and its successor the exercise of it, all of the others may be so aliened, and the result would follow that the agency established, for specified ends, may in the discretion defeat those ends. And in Ohio Life I. & T. Co. vs. Debalk, Judge Taney, says:

body of a State are undoubtedly committed to them as a trust to be exercised to the best of their judgment, for the public good, and no one Legislature can by its own act disown its successors of any of the powers or rights of sovereignty, confided by the people to the Legislative body unless they be authorized to do so under the Constitution, under which they were elected. They cannot therefore, by contract deprive a future Legislature of the power of imposing any tax it may deem necessary for the public good.

And in every question of this character, the question must depend upon the constitution of the State, and the extent of the power therein granted to the Legislative body."

And Mr. Justice Catron and Campbell seem by their

opinions to concur in this idea.

It must bowever be admitted that notwithstanding their view; as well as, in spite of the decisions of some of the most respectable Courts and Judges, of the State Courts, the Supreme Court of the United States, has with tolerable uniformity, laid down and adhered to the doctrine that such an exemption is within the ordinary Legislative discretion, that it may assume the shape of a contract, and when this is the ease that it is irrepealable unless expressly stipulated to the contrary. 7 Cranch 164. 3 Hen. 133. 16 Hen. 389.

As the Supreme Court of the United States is a Court of appeal from this court, on a question of this character, I feel bound to conform myself to its decision, and although I feel it to be my duty to what I deem the truth, to express my dissent from the conclusions at which it has arrived.

On the authority of these decisions we therefore decide that it is competent for the General Assembly to contract in the charter of a corporation that it shall be exempted from taxation, or as in the charter of the Georgia Railroad Company, that its tax shall not exceed ½ of one per cent. on its earnings, and that having so contracted, without reservation, it is not competent for a subsequent Legislature to violate the obligation of that contract by assessing a higher tax.

Now has there been any Legislation accepted by the company since the adoption of the Code, which puts this corporation on a footing with the Central or Southwestern Roads, so as that the tenure by which it holds its franchises and exemption is a charter granted since the Code, and [fol. 114] therefore capable of being withdrawn. Indeed with the exception of the Tax Act complained of, there has been since 1863, no legislation looking to any general oper-

ation on the charter.

The renewal of the Bank charter is doubtless within the provision of the Code making charters granted since its adoption repealable. But there is nothing in the Record showing that any portion of the capital is now employed in Banking, indeed directly the contrary is stated. The banking seems to be solely on the credit of the company.

There seems to be no doubt that the stock issued under the amendment granted to authorize the Clayton branch is within the clause. Such was the ruling of Judge Hopkins and we think he was right.

As to the surplus on hand, or any investments not strictly within the enterprise contemplated in the charter, we are clear that this is taxable. The company is only exempted on the value of its road, and its necessary appurtenances, and those appurtenances must be the ordinary and usual appurtenances of such an enterprise. Anything in the nature of an investment not within this scope is not exempt. We would not inquire closely into the status of affairs on any particular day, as it may well be that it may have a surplus on hand for a special purpose. But even as a fund to meet contingencies we think a permanent surplus is not covered by the exemption in the charter.

Judgment affirmed.

Supreme Court of Georgia.

Thursday, June 17, 1875.

The Honorable Supreme Court met pursuant to adjournment.

Present, their Honors, Hiram Warner, Chief Justice and H. K. McCay and R. P. Trippe, Judges.

The following judgment was rendered:

THE STATE OF GEORGIA

YS.

THE GA. R. R. & BRA. Co.

This case came before the court upon a transcript of the record from the Superior court of Fulton County, and after argument had, it is considered and adjudged by the court that the judgment of the court below be affirmed.

Clerk's Office, Supreme Court of Georgia, Atlanta, Ga., July 2, 1907.

I hereby certify that the foregoing pages hereto attached contain true copies of the original Bill of Exceptions, Transcript of Record, Opinion and Judgment of the Supreme Court of Georgia in the case of The State of Georgia, plaintiff in error, vs. The Georgia R. R. & Banking Co., defend-[fol. 115] ant in error. Said case being reported in the 54 Ga. R. p. 423, as appears from the records and files of this office.

Witness my signature and the seal of said Supreme Court hereto affixed the day and year first above written.

Z. D. Harrison, Clerk. (Seal Supreme Court of the State of Georgia.) Filed in Clerk's Office Jan'y 10, 1908. O. C. Fuller, Clerk, By W. C. Carter, Deputy.

Clerk's Certificate

UNITED STATES OF AMERICA, Fifth Judicial Circuit, Northern District of Georgia:

I, O. C. Fuller, Clerk of the Circuit Court of the United States for the Northern District of Georgia, do hereby certify that the above and foregoing is a true, full, correct and complete transcript of the record, assignments of error, bond and all proceedings had in cause No. 1192, wherein the Georgia Railroad and Banking Company is complainant and William A. Wright is defendant, except that the original Citation is included herein instead of a copy thereof, as fully as the same remain of record and on file in the clerk's office of the said Circuit Court.

In testimony whereof I hereunto set my hand and the seal of the said court, at Atlanta, Georgia, this the 28th day of January, A. D. 1908.

O. C. Fuller, Clerk. (Seal U. S. Circuit Court, N. D. Georgia.)

Endorsed on cover: File No. 21,006. N. Georgia C. C. U. S. Term No. 268. William A. Wright, Comptroller General of the State of Georgia, The Churty of Wilkes, and The County of Taliaferro, appellants, vs. Georgia Railroad & Banking Company. Filed February 6th, 1908. File No. 21,006.

[fol. 116] UNITED STATES OF AMERICA, SS:

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To the Honorable the Judges of the Circuit Court of the United States for the Northern District of Georgia

GREETING:

Whereas, lately in the Circut Court of the United States for the Northern District of Georgia before you or some of you, in a cause between The Georgia Railroad and Banking Company, complainant, and William A. Wright, Comptroller General of the State of Georgia, The County of Wilkes and the County of Taliaferro, defendants, wherein the decree of the taid Circuit Court, entered in said cause on the third day of July, A. D. 1907, is in the following words, viz:

"This cause coming on to be heard upon the bill of complaint of the Georgia Railroad & Banking Company vs. William A. Wright, Comptroller General, and amendments thereto and the exhibits to the same, and the answer and amendment thereof interposed thereto by the defendant, William A. Wright, Comptroller General, and upon the answer of the defendant Wilkes County, and upon the answer of the defendant Taliaferro County, it is

Considered, ordered and adjudged by the court that the Charter of the complainant, to wit; the Act of the Legislature of Georgia of December 21st, 1833, and various other Acts of said Legislature, passed prior to the 1st day of January, 1863, is a valid and binding contract between the State of Georgia, and complainant the Georgia Railroad & Banking Company;

That the said Charter covers complainant's main rail-road between the cities of Augusta and Atlanta, in said State one hundred and seventy-one miles; its branen rail-road between Barnett and the City of Washington, in said State, eighteen miles; and its branch railroad between Union Point and the City of Athens, said State, forty miles; and all of the apportenances of said railroad including their rolling stock; also complainant's franchise to be a corporation and other franchises without reference to the valuation of all of said property, which valuation it is admitted exceeds by four millions of dollars the nominal value of the

capital stock of said Company, said excess being produced by natural increase in the value of said property and by renewals, alterations and betterments of the same from time to time by the complainant. The said Charter provides a system of taxation for said property exclusive of all other taxation, to wit;—one half of one per cent. of the net earnings of said property.

That all property of complainant other than that above specified including so much of said property as is represented by four hundred and forty shares of stock subscribed under the Act of Oct. 5, 1868, is liable to taxation

under the general laws of the State of Georgia.

[fol. 117] It is further ordered, adjudged and decreed that defendant be perpetually enjoined from levying and collecting any taxes, State, county or municipal from said complainant not in accordance with this decree.

This the 3rd day of July, 1907.

Wm. T. Newman, U. S. Judge."

as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress, in such case made and provided, fully and at large appears.

[fol. 118] And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and nine, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued

by counsel:

On consideration, It is now here ordered, adjudged, and decreed by this Court that the decree of the said Circuit Court in this cause be, and the same is hereby, modified so as to exclude the eighteen miles constituting the Washington Branch Railroad, but in all other respects be, and the same is hereby, affirmed, the costs of this appeal to be divided between Wright, Comptroller General, and The Georgia Railroad & Banking Company.

February 21, 1910.

[fol. 119] You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion and decree of this Court as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 8th day of April in the year of our Lord one thousand nine hundred and ten.

James H. McKenney, Clark of the Supreme Court of the United States.

File No. 21,006. Supreme Court of the United States, No. 70, October Term, 1909. William A. Wright, Comptroller General, etc. vs. Georgia Railroad and Banking Company. Mandate. U. S. Circuit Court. Filed in Clerks Office, May 23, 1910. O. C. Fuller, Clerk.

[fol. 120-121]. WILLIAM A. WRIGHT, COMPTROLLER GENERAL OF THE STATE OF GEORGIA,

VS.

GEORGIA RAILROAD & BANKING COMPANY.

No. 1192 IN EQUITY

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

March Term 1910

An appeal in this case having been taken by complainant from the decree of this Court entered on the Third day of July, Anno Domini 1907 to the Supreme Court of the United States, and the said Supreme Court of the United States having on February 21st, Anno Domini 1910 issued its mandate affirming the said decree except as therein modified:

It is now ordered that said mandate of the Supreme Court of the United States be entered and that the same be bereby made the judgment of this Court.

o In open Court, this May 23, 1910.

(Signed) Wm. T. ____, U. S. Judge.



Altorney Denerals Office

STATE DE TEURTHA.

Manta !in

The State of Georgia Sellyality against tax fife fours by the She Georgia Rail Road Complotedly General and Muniking Company of Georgia.

During the fall him 1874 of the Dufferier Court of Hullow County Burgin Say Cause Came guts be heard before the Hounable pro I Northing Juste of an Infrier Courts of the Uttanta Circuit ropen agricums of Connect that earl ful should dead the Same as to law That, methout a fung Subject tonviser as in other Caus' Days defendant fout in Evidence de Charten assented to on the 31- of December 1833 (Ser pamp der, 1833 1 258) the Materi al parts of which on this case anas It is an all to man ponate the Blogen Rail that Company, man powers to Construct about a learnfulle stone from the City of Chequesta, mith branches extending to the hours of Calouin, marison in Huyan County and athers, to be canned by mother

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places, at the disention of said Company to fewish than who way mefully enfur the Same, to Confer all Conferate fours necessary to effect said object and to Refer a cortain and fapor 27 bear It provided generally for the organ Zation of the Company, procuring Sistempleous for stress, Sicuring funchacing and having a holding in their enecessors, any lands, terrements I himditurents to which they might find mecifony, gave them at all times the exclusion right of transportation or auryance ofpersone, muchanize aut produce, our part rail sout or rail roads, " While they See fut to Exercise the Exclusion right formord this charge no men than contain limited rates (5/2), gave arrivedy against obathristing or infurry Dard toad & gove there the pife to farm and Raide road to other the fifteenthe section ofsaid ach of 1833 Wes in these words. Phil aunted by the authority aforeard, That the Craberin right to make, Kufo rip, and un the raisonads and bransportations duttories by the act ...

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The defendants Comment admitted that said refundants had accepted the accomments paper actober 5 12 1868 acts of 1868 for 147) and 4th of February 1873 (act of 1873 pg 971 and harof 19 1 of achiber 1870 (act 1870 \$ 106-7) and that under the authors of each. act of 1868 sais defendant incres and fort share which men morte onther firelof april 1874 minety-Uni dolean for Share. Said amindreul mm as follows: An Act to increase the capital & define the sowers of the Georgia Rail Road & Bank. Thereas, In the original char ter of said yearha Kail Boas & Hanking Company, thenkenown as the Georgia Rail Road Com Jany, it is provided that Said Company shall have the fower to continue the actions brand towards any point which may be agreed report on the Jenne frey River, by the amended Charter? of said Company, paped in Escent ber 1835, it is provided that the cow

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hundren of Said road, bigen's Meling. so as to connect with the timent nati Rood, Shall be dlearily peroscented so Brow as the Com fearing so shall have Satisfactory evidence that the said connection com be gorners the herens to covered ble tropes are now enterdamed that saidenciniali Non i rville he finishedo Clayten at no distant clay; 1. Be it blure fore cina stor by the Legislature of the state of Gerria in you eral de format, I that the georgia Hail Read San Dong Com Dany leave the right to colone their roun from or wire the City of cithens lothe lower of Colonglow, in Ho bin County. I for that purpose the some company whall line of surjey all the powers is privileges of alle or fine for harter A amoliminals. Gre. II. Van the pur production the above. Beating the Back come bandy may inches ils empilal instruction francisco spirale terms, and the book of the col erry many dette services; promoder Barries Brende Shall o soger ter million del soull. I'm tomer company quay trace on This is poor copy, but is the best obtainable

interest, any surplus earnings on hand, in which may be deposited by others: provided, not exceeding seven per cent. interest or discount shall be charged with the remal rate of exchange on bills drawn on distant points. fee IV. Repeals conflicting laws. An Act to extend, continue Frenew the banking privileges of the Georgia Rail Road & Banking Company of Georpa. Gestion I Be it enacted, se, That the banking powers spriveleges heretofore granted to the Georgia Rail Hoad & Banking Company of Georgia, by an act approved December 18, 1835, the various acts amendatory thereof, are hereby continues, renewed Festended for a further term of thirty rears. Jec. 2 For it further enacted, That all lows sparts of laws mulitating against the processions of this del be, the same are therebyre. pealed Approved October 19,1870



DIRCLE DE TEPRTEIA.

Allunta Lin

An & Act to amend the Charter Company as to legalize certain aid extended by it to the Port Royal Railre a o Empany. Section I The General Assembly of the State of Georgia de enact, That from & after the passage of this Act, the action of the stockholders + board of directors of the goor. ya Railions & Banking Company, in arding the objects of the incorporation of the Fort Royal Railroad Company, in this State, I'm the state of South Carolina, by placing of the indorsement of the former Company reporthe bounds of the latter company, to the amount of five luner & dellows and Dollars, a gen the termsagreed upon by both aintanies, be & the voume is hereby legalized & reasonized as building reston the said companies rall parties conserned, with all

the terms of conditions of some contract in the same manner To lo lice same effect as if originally authorized by Approved Tebruary Ath, 1873. Iten the Evidence Cloud after agreement had the Court succe tained Said out of illigality as to all the tax claimed except the laxupor Law form hundred another Shans of Www Stack and Council for the State thin wir then cranted Und wir Bairing Raid lever of Said Carrel Comes the Connect for the State and tenders they of hills of Exceptione and Suigethat the Court Erred in holding that Said Excuption in South Char ter was not repealed by said tax adof1874; and that arappens; lotter care and proprient themen the lax actof 1874 violated the obligation of the Contract belining the State windfaed defendants lour lituted a control which the State and not reflect and in netricting the fife us he did by Rusel fred presents

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See of Leongia , and non come Mi Leungia Mailroad & Chambing Fullin County's tempany by it said allernys and on it part except to said fudgement in so far oney as the some Auguer said lay to be paid on said four hundue and forly shares of new book, not complaining of the personing & other Effect of said fragment F This defendant easy the court exact in deciding that the act of the regulature of Georgia afferred February 28 4/874 Entitled an act to amend the lax laws of This Stale to far as the same relate to received cornparis and to afine the hability of such companis to laration, and to depeal to much of the charling of euch companies as may coupled with the twoverious of this art, in a valid art and not in conflict with the constitution of the Muster Clases which dielains in the leath diction of the fine witich thereof that no black that any law impairing the obligation of entires," not only to as to furtist old Block of Raid Company fines. 336

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[fol. 149] IN UNITED STATES DISTRICT COURT.

Answer of Defendant on Request for Admission Under Rule 36—Filed April 2, 1949

Defendant, Charles D. Redwine, State Revenue Commissioner, in response to the request for admission of certain documents and matters, answers as follows:

1

Defendant admits the authenticity of the copy of the record in the case of William A. Wright, Comptroller General of Georgia, v. Georgia Railroad and Banking Company, referred to as "Exhibit A" in the request for admission.

2

Defendant admits the authenticity of Exhibit B as being a true copy of the record in the Supreme Court of Georgia in the case of State of Georgia v. Georgia Railroad and Banking Company, 54 Ga. 423.

3

Defendant admits the allegations contained in Paragraph 3 of the request for admission.

Eugene Cook, Attorney General; Claude Shaw, Deputy Assistant Attorney General.

Note: Certificate of Service Omitted.

[fol. 150] IN UNITED STATES DISTRICT COURT

MOTIONS OF PLAINTIFF FOR JUDGMENT ETC.—Filed April 5,

Plaintiff moves the Court:

1

To enter a judgment on the pleadings in favor of plaintiff permanently enjoining defendant from levying or collecting any ad valorem tax on the charter tax lines of plaintiff as described in the complaint, except as permitted in the prior decree of this Court as modified and affirmed by the Supreme Court of the United States, set out in paragraph 17 of the complaint.

To enter a summary judgment in favor of plaintiff permanently enjoining defendant from levying or collecting any ad valorem tax on the charter tax lines of plaintiff as described in the complaint, except as permitted in the prior decree of this Court as modified and affirmed by the Supreme Court of the United States, set out in paragraph 17 of the complaint.

3

If the motion for judgment on the pleadings and for summary judgment be not grafited, then to enter an interlocutory injunction temporarily enjoining defendant from levying or collecting any ad valorem tax on the charter tax lines of plaintiff as described in the complaint, except as permitted in the prior decree of this Court as modified and affirmed by the Supreme Court of the United States, set out in paragraph 17 of the complaint.

4

If the motion for judgment on the pleadings or for summary judgment be not granted, then to strike the 23rd defense insofar as the same denies paragraph 26 of the complaint, or in the alternative to require a more particular [fol. 151] statement of the denial of paragraph 26 as required by Rule 9(c) of the Rules of Civil Procedure.

Plaintiff submits in support of these motions:

- (a) The complete record in the case of Georgia Railroad & Banking Company v. William A. Wright, No. 1192 in Equity in this Honorable Court, and the record in said case on appeal to the Supreme Court of the United States, and the complete record in the case of State of Georgia v. Georgia Railroad & Banking Company, 54 Ga. 423; said records being adopted by reference both in the complaint of plaintiff and in the answer of defendant. Copies of said records will be presented at the hearing on this motion;
 - (b) Affidavit of Hal D. Beman;
 - (c) Affidavit of Hughes Spalding;
 - (d) The verified complaint;

(e) Request for Admission under Rule 36, filed March 25, 1949.

Spalding, Sibley, Troutman & Kelley; Robert B. Troutman, Furman Smith, Attorneys for Plaintiff, 434 Trust Company of Georgia Bldg., Atlanta, Georgia.

Note: Notice and Certificate of Service Omitted.

[fol. 152] IN UNITED STATES DISSRICT COURT

AFFIDAVIT OF HAL D. BEMAN-Filed April 5, 1949

Before the undersigned, an officer authorized to administer oaths, personally appeared Hal D. Beman; who, being sworn, deposes and says on oath as follows:

1

I am Vice-President of the Georgia Railroad & Banking Company. As such I have custody of the minute books and records of the Georgia Railroad & Banking Company. I have been employed by the Georgia Railroad & Banking Company since 1918.

The Georgia Railroad & Banking Company, between 1834 and 1845, built a railroad from Augusta, Georgia, to Atlanta, Georgia, a distance of approximately 171 miles, and a branch from Union Point to Athens, Georgia, a distance of approximately 39 miles. Said railroads were built by the Georgia Railroad & Banking Company either by its own forces or by contractors working under its supervision.

3

The facts stated in paragraph 2 above have always been general knowledge among the officers of the Georgia Railroad & Banking Company and are shown by the books and records of the Georgia Railroad & Banking Company in my custody as an officer of the corporation.

The Georgia Railroad & Banking Company has never paid any ad valorem taxes to the State of Georgia or any of its subdivisions on the line from Augusta to Atlanta or the branch from Union Point to Athens, except as provided in Sec. 15 of its original charter approved December 21, 1833. Between 1910, when the case of Georgia Railroad & Banking Company v. Wright, Comptroller General, in the United [fol. 153] States Court was finally decided, up until 1945, neither the State of Georgia nor any of its officials made any effort to collect any tax against said lines or any claim that such lines were subject to tax except as provided in Sec. 15 of the charter.

5

Attached hereto as Exhibit A is a true copy of an extract from the accounting report of the Interstate Commerce Commission on the Georgia Railroad & Banking Company, filed with the Georgia Railroad Company and forming part of its permanent records in my custody.

6

Attached as Exhibit B is a true copy of an extract from the decision of the Interstate Commerce Commission on the valuation of the Georgia Railroad & Banking Company, officially reported in 125 I.C.C. 551, and forming a part of the permanent records of the Georgia Railroad & Banking Company in my custody.

7

Attached as Exhibit C is a true copy of extracts from the minutes of the meetings of the stockholders and directors of Georgia Railroad & Banking Company in my custody as an officer of said corporation.

This affidavit is made to be used in evidence on the mo-

tions of plaintiff in the above stated case.

Hal D. Beman.

Sworn to and subscribed before me this the 1st day of April, 1949.

Beatrice W. Lee, Notary Public, Richmond County, Georgia, My Commission Expires Sept. 23, 1952. [Notarial Seal.] [fol. 154]

EXHIBIT "A" TO AFFIDAVIT

Extract from Accounting Report of Interstate Commerce Commission on Georgia Railroad & Banking Company

The Georgia acquired its mileage in the following described manner:

Acquired by	Approximate Mueage	
Construction:		
Augusta to Atlanta (main lin	ne). 171	
Camak to Warrenton (branch	h line) \ 4	
Union Point to Athens (branc		214
	· · · · · · · · · · · · · · · · · · ·	
Merger:		
Barnett to Washington (bran	ich line)	17
Purchase at Foreclosure Sale:		
Warrenton to Macon (extens	ion of branch	
line)	74	
Less M. & A. Junction (near	Mogul) to	10
Macon (abandoned after p		. \$70
Micros Control		
		AL PARTICIPATION AND PROPERTY AND ADMINISTRATION AN

Total approximate mileage

301

Acquired by Construction:

The Georgia constructed about 214 miles of its line of railway. The construction work was performed, either by the Georgia's own forces, or by contractors working under its supervision. The first surveys were commenced in November, 1834; the first actual construction work was begun in June, 1835; and the first mileage, from Augusta to a point about eleven miles west of that place, was epened for operation in May, 1837. The line was extended to Atlanta in sections, the last being completed in September, 1845. The branch line between Camak and Warrenton was opened for operation in January, 1838, and that between Union Point and Athens in December, 1841.

Filed April 5, 1949.

[fol. 155]

EXHIBIT "B" TO AFFIDAVIT

Extract from Valuation Report of Interstate Commerce Commission on Georgia Railroad & Banking Company, Reported in 125 I. C. C. 551, 592

The property owned by the Georgia on date of valuation was acquired as follows:

Approximate

Mileage

By construction:	
Augusta to Atlanta (main line)	171
Camak to Warrenton (branch line).	,, 4
Union Point to Athens (branch line)	1 39
Total constructed	214
By merger, Barnett to Washington (brane	ch line) 17
By purchase at foreclosure sale, Warre	nton to
Macon (extension to branch line), 7	4 miles,
less M & A Junction (near Mogul) to	Macon
(abandoned after purchase), 4 miles	70
Total	301

Acquired by Construction.—The Georgia constructed about 214 miles of its line of railway. The construction work was performed either by the Georgia's own forces or by contractors working under its supervision. The first surveys were commenced in November, 1834, the first actual construction work was begun in June, 1835, and the first mileage, from Augusta to a point about 14 miles west of that place, was opened for operation in May, 1837. The line was extended to Atlanta in sections, the last being completed in September, 1845. The branch line between Camak and Warrenton was opened for operation in January, 1838, and that between Union Point and Athens in December, 1841.

Copied from Book No. 3, Pages 75 and 76, Minutes of Meetings of Directors, The Georgia Railroad & Banking Co., from May 18, 1841 to May 10, 1871

A regular meeting of the Board was held on Tuesday the 10' November 1846, at which the following members attended, viz Mr. King President and Messrs Conyers, Saffold, Jones, Warren, Davis, Bowdre, Dougherty, Cunningham, Phinizy, Bones, Miller, D'Antignac & Stovall, Directors.

The minutes of the 14' July, 17 July, 31 July & 27' August 1846 & the State of the Bank for today were read &

approved.

The President submitted to the Board the following communication from J. Edgar Thomson:

"Chattanooga, July 22, 1846.

DEAR SIR: "

A severe cold, accompanied by considerable fever, prevented me while at Atlanta from writing to you as I had intended on the subject of our last conversation.

The kindness that has always been extended to me by the Stockholders of the Georgia Rail Road would prevent me from making any move that I think would be prejudicial to their interest.

The Road is now done, and it would seem that I might be relieved from its future superintendence. But as many of the Stockholders have expressed to be a strong desire, that I should still remain in the employment of the Company, I have upon reflection concluded to propose the following organization for conducting the business of the Road, which if adopted by the Direction will enable me to participate in its management, and attend, also, to some other engagements, which I feel under obligations to look after.

I propose, that Mr. Arms shall fill the office of General Superintendent of Transportation and auditor of accounts. [fol: 157] In the first capacity he will be charged with conducting the transportation on the Road and have direction of the Repair Shops at Augusta & Atlanta: and in the second, it will be his duty to audit all accounts with the several agencies of Transportation Department, and see that the amounts due to the Company are paid over to F. Midlams

Receiving Agent. Also, to examine and approve all debts due for Transportation, Motive Power, and Maintenance of Cars. Mr. Arms to be assisted in conducting transportation by Mr. Hight to whom the running of the Freight Trains will be committed in addition to his present duties.

The other officers to remain as heretofore except that Mr. Armstrong gives place to Mr. Beers as Bookkeeper.

The position that I propose to occupy is a general charge of the Repairs & Renewal of the Road and the machinery upon it, as heretofore, assist in the arrangement of Freights on the Road, and make to the Board at any time such recommendations as the operations of the Road may require to be carried out, or seem of importance to the interest of the Company. For the performance of these duties I shall not ask more than \$2000 per annum.

Garnett adheres to the classification of Freights on his.

road &c. &c.

Hon. J. P. King, President &c.

Yours truly, J. Edgar Thomson."

[fol. 158] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF HUGHES SPALDING-Filed April 5, 1949

Before the undersigned, an officer authorized to administer oaths, personally appeared Hughes Spalding, who, being sworn, deposes and says on oath as follows:

I am a partner of the firm of Spalding, Sibley, Troutman

& Kelley.

On February 8, 1949, I had a conference with Charles D. Redwine, State Revenue Commissioner of the State of Georgia. My partner, William K. Meadow, was present. At that time I told Mr. Redwine that my firm had been employed to represent the Georgia Railroad & Banking Company in its litigation with the State of Georgia overtaxes and that we were going to take over the pending litigation from now on. He replied that he did not know that. We talked briefly about the issues in the litigation. I asked him if he was going to proceed in an effort to collect the taxes claimed to be due when the remittitur in the present case came down to the Georgia courts. He said that he was and that when the matter was brought up to him he would issue an assessment to collect the taxes.

This affidavit is made to be used in evidence on the motions of plaintiff in the above stated case.

Hughes Spalding,

Sworn to and subscribed before me this the 4th day of April, 1949. Eugenia H. Brook, Notary Public, DeKalb County, Georgia. My Commission Expires Sept. 23, 1951. (Notarial Seal.)

[fol. 159] IN UNITED STATES DISTRICT COURT

REQUEST FOR ADMISSION

Under Rule 36

Filed April 12, 1949

Defendant, Charles D. Redwine, State Revenue Commissioner, pursuant to Rule 36 of the Rules of Civil Procedure requests plaintiff, Georgia Railroad and Banking Company within ten days after the service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

J

That the branch of plaintiff's railroad to be run from the Union Road to Eatonton, Georgia as provided for in the Act of 1833 creating the corporation, Georgia Railroad Company, has never been built.

2

That under the Act of 1833, it was provided that the Georgia Railroad Company should continue the Athens branch towards the point on the Tennessee River, and in pursuance of same, the said Georgia Railroad Company surveyed a line running from Athens, Georgia towards the Tennessee River near Decatur, Alabama. That branch has never been built.

3

That the portion of the railroad described in petition as running from Madison to Atlanta consisting of 67 miles

of what is termed the main line of said railroad, was constructed under the Act of the Georgia Legislature of 1837.

4

Nearly all the cost of the preceding branch of said railroad was paid with the net earnings of other portions of the railroad for the years 1843, 1844 and 1845, amounting to approximately \$440,000.00, and a bond issue of \$700,000.00.

5

The foregoing bond issue of \$700,000.00 was paid with the net carnings of the railroad.

(S.) Eugene Cook, Attorney General; Claude Shaw, Deputy Assistant Attorney General.

Certificate of service omitted.

[fol. 160] IN UNITED STATES DISTRICT COURT

OPINION DISMISSING COMPLAINT FOR WANT OF JURISDIC-TION-Filed August 10, 1949

This suit is another phase of litigation which has been presented to the courts by various proceedings, in various forms, for more than seventy years. Past litigation, and the present complainant by an Act of the Georgia Legislature in 1833. Full reference to the facts and the questions ultimately involved need not be stated here except by reference to phases of the former litigation which are directly involved here, to-wit: State of Georgia v. Georgia Railroad & Banking Company, 54 Ga. 423; Georgia Railroad & Banking Company v. Wright, 132 F. 912; Wright v. Georgia Railroad & Banking Company, 216 U. S. 420; Georgia Railroad & Banking Company v. Musgrove, 204 Ga. 139, 49 S. E. 2d 26.

In the present proceeding the complainant proceeds against Charles D. Redwine, State Revenue Commissioner of Georgia, to enjoin the assessment and collection of advalorem taxes which is alleged would be contrary to the provisions of complainant's legislative charter, and thus impair the obligation of the contract. The complainant

also seeks to enforce against Redwine, Revenue Commissioner, a previous decree of this Court entered in the case of Georgia Railroad and Banking Company vs. William A. Wright, Comptroller General, in 1907. 132 F. 912 (supra).

The defendant has filed a motion to dismiss, presenting various questions, the one now primarily for determination [fol. 161] asserting that the present suit is in effect one against the State of Georgia, and of which this Court has no jurisdiction because of the provisions of the 11th Amendment to the Constitution of the United States.

Complainant has moved for a judgment on the pleadings and for a summary judgment, and seeks to meet the attack of the defendant's motion upon the ground, principally, that as the result of participation by the Attorney General of Georgia in the former proceeding of 1907 the State waived its immunity from suit, and further, that the suit against the public officer to restrain the enforcement of an unconstitutional Act is not a suit against the State within the provisions of the 11th Amendment.

It seems proper to first consider the effect of the former adjudication of this Court in its decree of 1907 which restrained the defendant from assessing or collecting any taxes contrary to the terms of that decree. If bound thereby, the effect of the decree would require that the threatened assessment and collection of taxes by the det fendant be likewise now restrained. That proceeding ad-

judged the validity of the exemption now involved.

This former suit was between the present complainant, a corporation created under the laws of the State of Georgia, and "William A. Wright, a citizen of the State of Georgia." The defendant was represented by counsel who was the Attorney General of Georgia. He acknowledged service of the subpoena "William A. Wright, by John C. Hart, Attorney at Law and Attorney General [fol. 162] for Georgia." However, the pleadings were signed merely by the named counsel as "Counsel for defendant" and the pleadings for the defendant were entered in the name of "William A. Wright" as an individual. However, the opinion of the Court designates the defendant as "William A. Wright, Comptroller General of the State of Georgia." These references have been made to show

that there is no clear course of designation or conduct which would lead to the conclusion without doubt that the respective parties considered the suit one against Wright in his official capacity and as a representative of the State, or whether he was proceeded against as an individual, to restrain an illegal act threatened to be consummated under color of office.

Without regard, however, to whether the defendant was sued in his individual or official capacity, it is conceded that he was the official of the State charged with the assessment and collection of the taxes in question and, counsel for the complainant, relying upon the principle ruled in Gunter v. Atlantic Coast Line RR Co., 200 U. S. 273, contends that the State in that proceeding waived its immunity from suit by participation in behalf of the defendant by the Attorney General of Georgia, and the tacit adoption of the litigation by a subsequent Governor in his message to the Legislature. To ascertain the validity of this contention it becomes necessary to determine the power of the Attorney General of Georgia, and perhaps of the Governor of the State also, to waive the immunity of the State from suit by participating in, or the utterance of statements concerning, litigation against a State officer which seeks to control his official acts. It is of course established that the State's [fol. 163] waiver of immunity from suit, or its consent to suit, must be expressed by a statate. It becomes necessary then to consider the statutes of the State of Georgia.

The provisions of the statutes in effect at the time of the former suit, which more clearly than any other expresses the power of the Governor or Attorney General to consent to suit, are sections 23 and 220 of the Georgia Code of 1895, which provide:

Sec. 23. "When any suit is instituted against the State, or against any person, in the result of which the State has any interest under pretense of any claim inconsistent with its sovereignty, jurisdiction or rights, the Governor shall, in his discretion, provide for the defense of such suit, unless otherwise specially provided for."

Sec. 220. "It shall be the duty of the Attorney-General ... to represent the State ... in all civil and criminal cases in any court when required by the Governor."

As to suits against the Comptroller General, this officer was authorized "when the services of a Solicitor-General are necessary in collecting or securing any claim of the State in any part of the State, . . . to command the services of said Attorney-General in any and all of such cases . . ."

It will be observed that this statute has reference to "collecting or securing any claim of the State," and not broadly to defense of suits against the Comptroller General.

[fol. 164] It may be noted that these are mere general directions for legal representation and do not form specifically a part of the tax collecting machinery provided by the Georgia statutes as were the South Carolina statutes considered in the case of Gunter vs. Atlantic Coast Line RR Co., 200 U. S. 273. The construction of his powers and authority by the Attorney General, made without regard to pending litigation, throws some light, at least, upon the question. In an address on the "History, Powers and Duties of the Attorney General" by Honorable M. J. Yeomans, then Attorney General of Georgia, Report of the Georgia Bar Association 1937, in stating the things that the Attorney General of the State "may not do," among others, he said:

"1. He cannot consent for the State to be sued. Thave been requested, on several occasions, to consent to a suit being brought against the State. The Attorney General has no such authority. Neither has any other State officer. A consent on the part of the State to be sued must be found in some legislative enactment."

To complete the picture, it should be stated that in his message to the legislature in 1908, then Governor Smith, but who was not Governor at the time the suit was instituted in 1904, considered the litigation as "between the State and the Georgia Railroad and Banking Company." It may be that the proceeding was considered by the parties, counsel, the Court and, while on appeal, by the Governor, as one against the State. Nevertheless, the State, as a Sovereign, when the point is properly presented and relied upon, has the right to attack the attempted waiver of [fol. 165] sovereignty, or consent to suit, by officers not plainly authorized by statute to so subject the State to suit.

In Ford Company vs. Department of the Treasury, 323 U.S. 459, 467, 468, 469, there is a clear holding to this effect. Indeed this proposition does not involve a mere matter of parties or privies, but goes directly to the right of the Soverign to immunity from suit except where it has clearly consented thereto as a Sovereign. Strict enforcement of the rule is essential to prevent this essential attribute from being frittered away by assumed or even pretended waiver of the State's immunity from suit by officers not authorized to do so. The only safe rule in such an instance will appear to be that the only proper basis for declaring consent or establishing waiver must be found clearly expressed in some constitutional or statutory provision directly relating to the subject matter involved. This is the basis of the holding in Gunter vs. Atlantic Coast Line Railroad, supra. which is confidently relied upon by the complainant in the present case. That decision, as appears therefrom, and from the construction given to it in two recent cases. Great Northern Ins. Co. vs. Read, 322. U. S. 47, 56, and Ford Company vs. Department of the Treasury, 323 U.S. 459, supra, is predicated upon the South Carolina statutes, which had reference to an action for the collection of the taxes then involved, and provided that the Attorney General "shall defend said action for and on behalf of the State." The marked difference between the statutes of the State of Georgia and the South Carolina statute just refered to, renders clearly inapplicable the decision in the Gunter case. In view of the provisions of the Georgia statute and the primacy of sovereign immunity from suit Hol. 1661 now asserted, the language of the Supreme Court as to the waiver by individuals of constitutional rights seems apposite, that is that " 'Courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights." Johnson vs. Zerbst, 304. U. S. 464, citing Aetna Insurance Company vs. Kennedy, 301 U. S. 389, 393; Hodges vs. Easton, 106 U. S. 408, 412; Ohio Bell Telephone Co. vs. Public Utilities Commission, 301 U. S. 292, 307. See also, Glasser vs. U. S., 315 U. S. 60, 70.

It is true, as argued by the complainant, that following the decision in the Wright case in this Court, affirmed by the Supreme Court of the United States, no State officer for

many years made any attempt to assess the charter lines of the defendant for ad valorem taxes. The decision in Gunter vs. Atlantic Coast Line Roailroad, supra, gives some weight to this feature, and of course "Administrative construction by a state of its statutes of consent," is entitled to weight. Ford Company vs. Department of the Treasury, supra. The conclusive effect of such official inaction, however, is seriously undermined, if not destroyed, by the action of the present complainant in instituting in the State Court in 1945 a proceeding against the State Revenue. Commissioner of the State of Georgia, first naming him defendant "in his representative capacity," but afterwards amending it to read as against the named individual "who is State Revenue Commissioner of the State of Georgia," and which was afterwards amended to substitute as a party his successors in office as State Revenue Commissioner, as defendants. In that proceeding, the 1907 [fol. 167] decree of this Court was submitted as res adjudicata, as was also the decision of the Supreme Court. of Georgia in State of Georgia vs. Georgia Railroad and Banking Company, 54 Ga. 423. In that proceeding the question was squarely presented by demurrer that the suit was "in reality a suit against the State of Georgia and the State of Georgia has not consented to be made a party to this action or for the action to proceed against it." The trial court overruled this demurrer, but its judgment was reversed by the Supreme Court with directions that the same be sustained, and the petition dismissed because. patently a proceeding against the State without its consent, Musgrove vs. Georgia Railroad & Banking Company, 204 Ga. 139, 49 S. E. 2d 26. Appeal to the Supreme Court of the United States was dismissed. Georgia Railroad & Banking Company vs. Musgrove, 835 U. S. 900. The Supreme Court of Georgia expressly referred to the former litigation in this Court and directed attention to the fact that in that case the question of the State's consent to suit was not raised. The Gunter Case, supra, was cited in the decision and the Supreme Court of Georgia plainly did not consider the law of Georgia to be to the same effect as that of South Carolina there considered. The question of waiver and the construction of the effect of the former decree was directly presented, for a copy of the entire record of the Wright case in this Court and in the Supreme. Court of the United States was attached as a part of the

petition in support of the plea of res adjudicata and as an estoppel. This holding by the highest Court of the State of Georgia upon the identical issues now sought to be presented, that the proceeding was one against the State and therefore not maintainable without the State's consent, is [fol. 168] more than an "administrative construction" and is a holding by every fair implication that the Georgia statutes did not provide authority for the officers participating in the former litigation to waive the State's immunity from suit or evidence its consent. In these circumstances, the admitted inaction of the State officials for calong period of time is entitled to no compelling force in determining the effect of the participation by the State of-

ficers in the former litigation.

The present defendant urges the decision in the Musgrove case, supra, as res adjudicata upon the principle stated in 50 Corpus Juris Secundum, page 15, section 597, as follows: "Although it has been said that, when a cause has been once fairly tried, it should not be tried again, even if the parties are willing, it is nevertheless a general rule that a party entitled to claim the benefit of a former judgment may waive or estop himself to assert such right. So, where a party . . . joins issue on the very questions settled by the judgment, or voluntarily opens an investigation of the matters which he might claim to be concluded by it, . . . he will be held to have waived the benefit of the estoppel, and the case may be determined as though no such former judgment had been rendered." In this case we find it unnecessary to explore this principle to its fullest extent as an application of res adjudicate. It nevertheless seems to be pertinent in determining the effect to be given to the provisions of the Georgia statutes and the circumstances surrounding the former litigation in this Court, as well as the inaction of the State officers since the rendition of the decree therein.

It is concluded that no sufficient showing is made that in the original proceedings in this Court the State [fol. 169] waived its immunity from suit or became bound by the decree. The question is therefore open, and being now asserted in bar of the present proceeding, it must be sustained.

The complainant contends that even if the State be not bound, it is nevertheless entitled to proceed by the present action as ancillary to the original suit against the defendant

successor in office of William A. Wright, the Comptroller General of Georgia, defendant in the original suit! Under the law of Georgia defendant, Redwine, as the State Revenue Commissioner of the State of Georgia; is in effect the successor in office of the Comptroller General. However, this question is immaterial, for as well demonstrated in Musgrove vs. Georgia Railroad and Banking Company, supra, the suit is in substance and direct effect an action against the State, and not maintainable without its consent when the point is properly presented, as it now is. In view of the well considered opinion and discussion by Mr. Justice Bell in that case, no further discussion on this point is necessary here, except by reference. Complainant contends that the true holding of the Georgia Supreme Court in the case just mentioned is that a proceeding for declaratory judgment would not lie. Even if this were true, the opinion is nevertheless sound and controlling upon the points here involved, but it must be borne in mind that as clearly appears, that proceeding was also one for an injunction, and as to this feature, substantially identical with the present proceeding.

For the reasons just stated, it is clear that the effort to enforce the prior decree, as well as the relief sought by the ancillary proceedings are both proceedings against the

[fol. 170] State, which are not permissible.

Complainant further contends that the 11th Amendment does not prohibit suits against a State official to enjoin the enforcement of a State tax law, or any other State law, contrary to the Constitution of the United States, and numerous authorities are cited in support of this contention. It of course must be conceded that in proper circumstances, and especially where there is involved no specific performance of a contract by the State, a suit against a State official to restrain illegal action, has been held not to be such a suit against the State as is prohibited by the 11th Amendment. It is not necessary to enter upon any extended discussion of the numerous adjudications which sustain the general proposition asserted by the complainant. There are adjudications which contain language, not directly controlling or involved in the case, to the effect that even where a contract of the State is involved, the assertion of gestraint against the State official is not a suit against the State. However, none of these determines the

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particular point here involved, and that is, as clearly stated in In re Ayers, 123 U. S. 443, 502, a ruling which has not been departed from, that "A bill in equity for the specific performance of the contract against the State by name, it is admitted could not be brought. In Hagood v. Southern, 117 U. S. 52 it was decided that in such a bill, where the State was not nominally a party to the record, brought against its officers and agents, having no personal interest in the subject matter of the suit, and defending only as representing the State, where 'The things required by the decree to be done and performed by them are the very things which, when done and performed, constitute a [fol. 171] performance of the alleged contract by the State, the court was without jurisdiction, because it was a

suit against a State.

"The converse of that proposition must be equally true, because it is contained in it: that is, a bill, the object of which is by injunction, indirectly, to compel the specific performance of the contract, by forbidding all those acts and doings which constitute breaches of the contract, must also, necessarily, be a suit against the State. In such a case, though the State be not nominally a party on the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things. which constitute a breach of its contract, the suit is still, in substance, though not in form, a suit against the State." As clearly pointed out in the decision in that case, the point to be borne in mind in applying the principle of the authorities is that a suit predicated upon a contract with the State, (the one in the present case alleged to be prescribed by the complainant's charter), by enjoining the act of an officer and to indirectly compel the specific performance of the contract, "by forbidding all those acts and doings which constitute breaches of the contract, must / . . be a suit against the State." The present suit is predicated upon the claim that the assessment and collection against its charter tax lines, as otherwise permitted by the statute, would constitute an impairment of the obligation of the contract so that the principle of the Ayers case is inescapably applicable, because to grant the relief here sought will require the State to comply with and perform its contract of exemption. In fact, there is no claim of unconstitutionality in the statute under which the defendant threat-[fol. 172] ens to proceed, but merely that because of the

contract, such procedure would unconstitutionally impair the obligation of the contract. The State is the contracting party, and an injunction against its officer in this case would be merely an enforcement of the State's contract in a suit in which it has not consented to be sued. Avers, supra, p. 503.

Therefore, the defendant official has in this case not merely urged the State's immunity as justification for his intended official acts, -he has established that the suit is in

fact against the State.

The Gunter case referred to above involved a charter exemption from taxation. Its language that a suit against State officers to enjoin them from enforcing an unconstitutional tax was not a suit against the State within the prohibition of the 11th Amendment, was clearly not considered controlling upon the contract feature of the case, or else it would not have been necessary to determine what was considered the actual question involved, that is, whether the State had waived its immunity from suit. In the other adjudications cited by the complainant, there was either no express contract by the State involved, or this question was not considered controlling, or the point was not raised. So it may be stated that there is no opinion subsequent to the Ayers case, supra, which expressly, or by necessary implication, weakens its controlling effect.

Under our dual system of Government, recognition of the right and power of a State as a Sovereign, is of course essential and well-understood. The importance of maintaining State sovereignty and immunity from suit in a [fol. 173] proper case, as provided by the 11th Amendment, (the history of which need not be repeated here) is such that we have fully considered that question as here presented without regard to the ultimate merits of the contentions of the complainant as they are here, or may be hereafter, asserted when and if the State may itself move against the complainant in breach or avoidance of the contract of exemption from taxation provided in the complainant's charter. Thus, without any expression upon the ultimate merits of the case, but upon determination that the proceeding is in effect one against the State and prohibited by the 11th Amendment, we conclude that this Court is without jurisdiction of the present proceeding and that the motion of the defendant now urged in effect on behalf of the State, should be, and the same hereby is, sustained,

The complaint accordingly is dismissed for want of jurisdiction in this Court to entertain the same.

This the 29th day of July 1949.

Leon McCord, United States Circuit Judge. Robert L. Russell, United States District Judge.

[fol. 174] IN UNITED STATES DISTRICT COURT

DISSENTING OFINION—Filed Aug. 10, 1949

I respectfully dissent from the majority opinion in this

case.

There is no necessity for my giving a lengthly statement of the facts in this case. Suffice to say that the State of Georgia for over seventy years has, by various procedures and various forms, been trying to vitiate or nullify this contract in question which is the basis of this suit under consideration. (City of Augusta Vs Georgia Railroad & Banking Company, 26 Georgia, 651, 662, et seq.; The State of Georgia, Vs Georgia Railroad & Banking Company, 54 Georgia, 423; Goldsmith, Comptroller Sc., Vs Georgia Railroad & Banking Company, 62 Georgia, 485.)

Judge Newman of this court (Northern District of Georgia), on the 3rd day of July, 1907, decided the contract at issue between the State of Georgia, acting by and through its Legislature and Governor and The Georgia Railroad & Banking Company was a valid and binding contract. Judge Newman's decision was affirmed by the Supreme Court of the United States in the case of Wright, Comptroller, Vs The Georgia Railroad & Banking Com-

pany, U. S. Supreme Court 216, page 420.

[fol. 175] The plaintiff in this case, The Georgia Railroad & Banking Company has filed a motion for judgment on the pleadings or for summary judgment. The defendant has filed a motion to dismiss. The majority of this court has decided to sustain the motion to dismiss for reasons as set forth in their decision. I am deciding in favor of a judgment on the pleadings or summary judgment as follows:

I believe this Court has jurisdiction because this action is an ancillary or supplemental bill to effectuate or enforce a prior decree of this court as hereinabove stated. (See also Root Vs Woolworth, 150 U.S. 201. Gunter Vs Atlantic

Coast Line Railroad, 200 U. S. 273.) The State of Georgia is therefore before this court by reason of these decisions. Being before this court this action is merely, as stated above, simply an action to effectuate the prior decree of this court.

I do not believe the case of Musgrove Vs The Georgia Railroad Banking Company, 49 S. E. 2d 26, cited by The State of Georgia and the majority of this court is applicable to this case, because that case merely decided the question of state practice and did not decide this particular federal question, or any other federal question.

The judgment of this Court as affirmed by the Supreme Court of the United States is conclusive on the validity and effect of the contract of exemption not only as against the contentions actually urged in that case but as against all contentions that could have been urged. (See Gunter Vs Atlantic Coast Line, 200 U. S. 273; Deposit Bank Vs Frankfort, 191 U. S. 499; New Orleans Vs Citizens Bank, 167 U. S. 371; Montgomery Vs Thomas (C. C. A. 5), 146 F. (2d) 76; Leininger Vs Commissioner (C. C. A. 6), 86 F. (2d) 791.

July 29, 1949.

Respectfully,

F. M. Scarlett, U. S. District Judge, for the Southern District of Georgia.

[File endorsement omitted.]

[fol. 176] IN UNITED STATES DISTRICT COURT

Motion for Rehearing and to Alaur Judgment-Filed Aug. 19, 1949

Plaintiff, Georgia Railroad & Banking Company, moves the Court to grant a rehearing and reconsider the judgment entered August 10, 1949, dismissing the complaint for want of jurisdiction, and to alter and set aside said judgment and to enter judgment for plaintiff as moved in plaintiff's prior motion.

As grounds for this motion plaintiff shows:

1

In holding that the action was a suit against the State within the prohibition of the 11th Amendment and in dismissing the action on that ground, the Court overlooked or failed to apply the repeated decisions of the Supreme Court of the United States holding that such action is not an action against the State.

Board of Liquidation v. McComb, 92 U. S. 531.

Allen v. B. & O. Railroad, 114 U. S. 311.

Gunter v. Atlantic Coast Line Railroad, 200 U. S. 273.

In each of the above cases the action was to enjoin a state official from enforcing a state tax on the grounds that such tax impaired a contract between the state and plaintiff. In each case the Supreme Court held that such action was not against the state within the meaning of the 11th Amendment.

In addition, the Supreme Court has in many cases affirmed injunctions against state officials enjoining the collection of a tax contrary to contractual exemption from tax, two of the cases involving this very charter.

Wright v. Georgia Railroad & Banking Co., 216 U. S., 420.

[fol. 177] Wright v. L & N Railroad, 236 U. S. 687. Wright v. Central of Georgia Railroad, 236 U. S. 674. Powers v. Detroit & Grand Haven Railway, 201 U. S.

Wright v. Sills, 2 Black 544.

Humphrey v. Pegues, 16 Wall. 244. Tomlinson v. Branch, 15 Wall. 460. Dodge v. Woolsey, 18 Howard 331.

In the latter cases the court did not discuss the question of whether the action was against the state, both the court and the parties considering the question so well settled as not even to merit discussion.

The above cases on suits against the Sovereign were exhaustively considered and reaffirmed in the recent case of Larson v. Domestic & Foreign Commerce Corporation, decided June 27, 1949, 69 Sup. Ct. 1457. In that case the court, after review of the authorities, held that if the action of the state official had not been authorized by the state and was ultra vires, the suit to enjoin such action was not against the state because it did not interfere with any action the state had properly authorized. In the same way if the statute under which the state official was threatening to act, or if his actions, were contrary to the constitution,

then such actions were not actions of the state because the state had not and could not constitutionally authorize such actions.

There may be, of course, suits for specific relief against officers of the Sovereign which are not suits against the Sovereign. . . . Where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sov-The officer is not doing the business ereign actions. which the Sovereign has empowered him to do or he is doing it in a way which the Sovereign has forbid-His actions are ultra vires his authority and therefore may be made the object of specific relief. . [fol. 178] "A second type of case is that in which the statute or order conferring power upon the officer totake action in the Sovereign's name is claimed to beunconstitutional. Actions for habeas corpus against. a warden and injunction against the threatened enforcement of unconstitutional statutes are familiar examples of this type. Here too the conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the Sovereign. The only difference is that in this case the power has been conferred in form but the grant is lacking in substance because of its constitutional invalidity."

This case falls squarely within the rule there laid down. The constitutional and statutory provision under which Redwine threatens to act are contrary to the Constitution of the United States and therefore are a nullity and void. Indeed, they have been so held both by the Supreme Court of Georgia and by the Supreme Court of the United States. Therefore, Redwine has not been authorized by any valid statute of Georgia to take the action he threatens to take. His acts are and will be beyond his authority and ultra vires. Therefore, as the Supreme Court has said, such acts, not having been validly authorized, will not be the acts of the State of Georgia and an injunction restraining such acts will not restrain the State of Georgia and is not within the prohibition of the 11th Amendment.

The Court misconstrues the decision in Gunter v. Atlantic Coast Line, 200 U.S. 273. The Gourt did not hold that consent of the state was necessary to a suit to enjoin an officer from collecting unconstitutional tax. On the contrary, the court said, without qualification:

"A suit against state officers to enjoin them from enforcing a tax alleged to be in violation of the Constitution of the United States is not a suit against the State within the prohibition of the Eleventh Amendment."

The discussion of consent and waiver in the prior case dealt only with the effect of the prior decree as reg judicata and with the application of Sec. 720 prohibiting injunction [fol. 179] against suits in the State Court. The Supreme Court held that Sec. 720 has no application to ancillary actions to enforce the prior decree by enjoining suit in the State Court.

The Court also misconceived the effect of In Re Ayers, 123 U.S. 443. In that case Virginia had issued bonds which provided that the coupons would be receivable in payment of all taxes due the state. Thereafter the state passed a statute providing that suit be brought against all taxpayers who had tendered such coupons and that in such suits the taxpayer be required to prove that the coupons were genuine and not counterfeit. The plaintiff in the action was not a taxpayer but was a person who had bought the coupons for resale. He alleged the effect of the statute was to depreciate the value of the coupons he had bought. He prayed that the Attorney General be enjoined from bringing any such suits and be required to dismiss those brought. The Attorney General was enjoined from bringing suit in the name of Virginia and was ordered to dismiss an action pending in the name of the State of Virginia. When he refused he was attached for contempt and appealed.

In that case, as the Supreme Court pointed out, the action for which the Attorney General was held in contempt was refusal to dismiss a petition brought in the name of the State of Virginia. Certainly it was within the authority of the Attorney General to bring or dismiss an action in the name of the State and an order requiring him to dismiss such action certainly required him to act as an official and

not as an individual.

But where the action was to enjoin the officer from levying on property after there had been a proper tender of the coupons, the Supreme Court specially held that the injunction was proper and that the action was not against the state within the meaning of the 11th Amendment, the same Justice writing both opinions.

[fol. 180] Allen v. Baltimore & Ohio Railroad Co., 114 U. S. 311;

Poindexter v. Greenhow, 114 U.S. 270.

The Supreme Court in the Ayers case expressly reaffirmed the doctrine in the Allen and Poindexter cases and specifically said that nothing decided in the Ayers case was in-

tended to impinge the principle of those cases?

Plaintiff in this case clearly falls within the rule of the Allen case and not the Ayers case. Plaintiff does not ask that Redwine be required to take or refrain from taking any action in the name of the State of Georgia or any action which the State of Georgia has validly authorized. It merely prays that he be enjoined from seizing property of plaintiff, which he has not been authorized, and which he cannot constitutionally be authorized, by the State of Georgia to seize. Such action is not an action against the State under the repeated decisions of the Supreme Court, reaffirmed as recently as June of was year in the Larson case, 69 Sup. Ct. 1457.

9

The decision of the Court is inconsistent in that it holds that the prior decree of the court, affirmed by the Supreme Court, is not binding on the State or its subordinate officials because the prior action was against Wright as an individual and not against the State, while the decision holds that the present action may not be maintained because it is against the State and not against Redwine as an individual. Yet the two proceedings are cast in exactly the same form and pray precisely the same remedy.

If the prior decree was against the State, the State and all of its subordinate officials are bound by it. The State cannot, after final decree, contend that the prior proceeding was beyond the jurisdiction of the court. The final decree adjudicates that the court had jurisdiction, just as it adjudicated every other point necessary to a decree. The Supreme [fol. 181] Court has repeatedly held that the contention cannot be made after final decree that the federal court was

without jurisdiction of the original action, even though such lack of jurisdiction appears on the face of the record.

Chicot County Drainage Dist. v. Baxter State Bank, 308

U.S. 371;

Dowell v. Applegate, 152 U. S. 327.

The Court of Appeals of Georgia has also held that the State cannot, after final judgment, contend that suit against the State was not properly brought, even though the Supreme Court in the meantime has held in another case that such suit could not be brought against the State. The Court of Appeals holds that the judgment concludes the question.

Thompson v. Continental Gin Co., 73 Ga. App. 694.

The case of Ford Co. v. Department of Treasury, 323 U. S. 459, is not to the contrary. In that case the objection that the action was against the State without its consent was raised prior to final decree. It is settled that jurisdiction of a federal court may be raised by the Supreme Court on its own motion at any time before final decree, but cannot be raised after decree has been entered and has become final.

3

It is not necessary that the prior action have been against the State in order that the State and its subordinate officials be bound thereby and in order that the court have ancillary jurisdiction to enforce that decree against Redwine.

It is well settled that a person interested in a case who employs counsel to defend it, or otherwise participates in the defense is bound thereby as fully as if he had been a

party to the record.

"One who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in [fol. 182] aid of some interest of his own, and who does this openly to the knowledge of the opposing party, is as much bound by the judgment and as fully entitled to avail himself of it as an estoppel against the adverse party, as he would be if he had been a party to the record."

Souffront v. Campagne des Sucreries, 217 U.S. 475, 487.

This rule applies equally to the Sovereiga.

"If the United States in fact employs counsel to represent its interest in a litigation or otherwise actively aids in its conduct, it is properly enough deemed to be a party and not a stranger to the litigation and bound by its result."

Drummond v. United States, 324 U. S. 316, 318. United States v. Candelaria, 271 U. S. 432.

4

The Court, in its opinion, says that no sufficient showing has been made that the Governor authorized or directed the Attorney-General to defend the prior action. The Court overlooks the fact that the proceeding is before the Court on motion, and that the judgment is one dismissing the complaint on motion and not after hearing on the merits. If, as the Court contends, plaintiff's motion for summary judgment does not sufficiently show this authority, plaintiff is entitled to an opportunity to make such showing, if it can, on final hearing on the merits.

This is particularly important in view of the fact that the files both of the Governor's office and of the Attorney General's office for the years 1900 through 1910 are lost and

plaintiff has not yet been able to locate them.

Robert B. Troutman, Furman Smith, Counsel for Plaintiff, Georgia Railroad & Banking Co.

Note: Notice and Acknowledgment of Service Omitted.

[fol. 183] IN UNITED STATES DISTRICT COURT

AMENDMENT TO MOTION FOR REHEARING AND TO ALTER JUDG-MENT—Filed September 16, 1949

Comes now plaintiff, Georgia Railroad & Banking Company, and amends its motion heretofore filed for a rehearing and to reconsider, alter and set aside the judgment entered August 10, 1949, by adding thereto the following additional ground:

O

The holding of this Court that plaintiff cannot bring judicial proceedings to test the validity of the tax proposed to be assessed against and collected from plaintiff, or to prevent the seizure of its property for such taxes, together with the failure of the law of Georgia to give to plaintiff any opportunity for hearing on the validity of such tax, will have the effect of depriving plaintiff of its property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States and contrary to Article I, Sec. 1, par. 3, of the Constitution of Georgia.

The Supreme Court has held "that the assessment of a tax is action judicial in its nature, requiring for the legal exertion of the power such opportunity to appear and be heard as the circumstances of the case require" and "that due process of law requires that after such notice as may be appropriate the taxpayer have opportunity to be heard as to the validity of the tax", and that if the state law does not otherwise grant a remedy for contesting the tax, the Constitution requires that the taxpayer have the right to enjoin the state taxing officials from assessing and collecting such tax:

Central of Georgia Railway v. Wright, 207 U.S. 127.

Turner v. Wade, 254 U. S. 64.

[fol. 184] Lipke v. Lederer, 259 U. S. 557.

Regal Drug Corporation v. Waddell, 260 U. S. 386.

As alleged in the complaint and pointed out in the plaintiff's brief, the Georgia law does not afford plaintiff any, opportunity to be heard on the validity of the tax or any procedure for resisting the tax. Therefore, unless plaintiff is permitted to enjoin the taxing officials from wrongfully assessing and collecting such tax, its property will be seized without due process of law. The Fourteenth Amendment to the Constitution of the United States imperatively requires that plaintiff be given the right to enjoin such illegal tax, in the absence of other procedure for contesting such tax.

Robert B. Troutman, Furman Smith, Attorneys for Plaintiff, 434 Trust Company of Georgia Bldg., Atlanta, Georgia.

Note: Certificate of Service Omitted.

[fol. 185] IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION FOR REHEARING—Filed October 3, 1949

In written argument on motion for rehearing, counsel for complainant contends that the opinion of the majority is subject to the construction that it forbids any resistance by complainant to the actual levy and sale of its property by the State for the collection of taxes. Without intimating any agreement whatever with this view of the effect of the order of the Court dismissing the complaint, there appears no objection to further clarification of the order of the majority by the statement that the Court did not intend to, and did not, hold that if and when the State itself proceeded to levy upon and sell any of the property of the complainant, the complainant was debarred from contesting the validity of the claim sought to be asserted. We did not, and do not now, intimate any advisory opinion as to the proper remedy of the complainant in such circumstances since, as heretofore held, the present proceeding may not be maintained against the State. The motion for rehearing is denied.

This the 3rd day of October, 1949.

(S.) Leon McCord, United States Circuit Judge; Robert L. Russell, United States District Judge.

[fol. 186] IN UNITED STATES DISTRICT COURT,

Petition for Appeal—Filed October 6, 1949.

To the District Court of the United States for the Northern District of Georgia, Newnan Division, and to the Honorable Robert L. Russell, One of the Judges Thereof:

The Georgia Railroad & Banking Company, feeling itself aggrieved by the judgment entered in this cause on August 10, 1949, dismissing the complaint for want of jurisdiction, and the judgment entered October 3, 1949, modifying the opinion and overruling the motion of petitioner to grant a rehearing and alter and set aside said judgment, does hereby appeal from said judgments to the Supreme Court of the United States, for the reasons and on the grounds

stated in the assignments of error filed herewith, and petitions that this appeal be allowed, and that an order be entered fixing the amount of bond to be given by said plaintiff as appellant conditioned as the law provides, and that eitation issue as provided by law and that a transcript of the record upon which said judgments and based, duly auffol. 187] thenticated, be transmitted to the Supreme Court of the United States at Washington, D. C., in order that the errors complained of may be considered and corrected.

Robert B. Troutman, Furman Smith, Attorneys for Plaintiff.

Spalding, Sibley, Troutman & Kelley, 434 Trust Company of Georgia Bldg., Atlanta, Georgia, of Counsel for Plaintiff.

[fol. 188] IN UNITED STATES DISTRICT, COURT

ORDER ALLOWING APPEAL—Filed October 6, 1949

Georgia Railroad & Banking Company, plaintiff in the above stated case, having filed its petition for appeal to the Supreme Court of the United States from the judgment entered August 19, 1949, dismissing the complaint for want of jurisdiction, and from the judgment entered October 3, 1949, overruling the motion for rehearing and to alter and set aside said judgment, together with its assignments of error and together with its statement disclosing the basis on which it is contended that the Supreme Court had jurisdiction, as required by Rule 12,

It is ordered that said petition be and the same is hereby granted and the appeal allowed, upon said petitioner giving bond for costs as required by law in the sum of \$250.

This the 6th day of October, 1949.

Robert L. Russell, United States District Judge.

[fol. 189] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed October 6, 1949

Comes now the plaintiff, Georgia Railroad & Banking Company, in connection with its petition for appeal to the Supreme Court of the United States from the judgment dismissing its complaint for want of jurisdiction and from the judgment overruling its motion for rehearing, and says the Court erred in the following respects and assigns the following errors for the reversal of said judgment:

1

The Court erred in sustaining the defendant's motion to dismiss and in dismissing plaintiff's complaint.

2

The Court erred in not sustaining plaintiff's motion to enter a judgment on the pleadings in favor of plaintiff and in not entering judgment on the pleadings in favor of plaintiff as moved in said motion.

[fol. 190]

3

The Court erred in not systaining plaintiff's motion for a summary judgment in favor of plaintiff and in not entering a summary judgment in favor of plaintiff as prayed in said motion.

The Court erred in not sustaining plaintiff's motion for an interlocutory injunction and in not granting an interlocutory injunction as prayed in plaintiff's motion.

5

The Court erred in holding that the action was an action against the State of Georgia within the prohibition of the 11th Amendment to the Constitution of the United States.

The Court erred in not holding that defendant had not been authorized by any valid, constitutional law to seize the property of plaintiff, and therefore he should be enjoined as a wrongdoer from such threatened seizure, and the State of Georgia, not having validly authorized such acts, would not be a party to such acts and would not be enjoined by such injunction.

7

The Court erred in not holding that the provision of the charter of plaintiff set out in the complaint was an irrevocable contract and that the provisions of the Constitution and laws of Georgia referred to in the complaint were unconstitutional and void as against plaintiff on the grounds that they impaired the obligation of said contract contrary to Sec. 10 of Art. I of the Constitution of the United States.

[sols. 191-199]

R

The Court erred in not holding that defendant was bound by the previous decree of said Court, as modified and affirmed by the Supreme Court of the United States, and in not holding that the Court had jurisdiction to enforce its prior decree, and in not entering appropriate orders to carry out and enforce said prior decree.

9

The Court erred in holding that plaintiff cannot maintain any action to prevent the levy and collection of the claimed taxes on its property and the seizure of its property for such claimed taxes, for the reason that such decision will sesult in plaintiff being denied any opportunity to be heard on the validity of the tax and will result in plaintiff being deprived of its property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States and contrary to Article I, Sec. 1, par. 3 of the Constitution of Georgia.

Wherefore, plaintiff prays that said judgment dismissing the complaint be reversed and that the cause be re-

manded to the District Court with instruction to enter significant judgment for plaintiff as prayed.

Robert B. Troutman & Furman Smith, Attorneys for

Plaintiff.

Spalding, Sibley, Troutman & Kelley, 434 Trust Company of Georgia Bldg., Atlanta, Georgia, of Counsel, for Plaintiff.

[fols. 200-201] Citation in usual form showing service on Eugene Cook, filed Oct. 7, 1949, omitted in printing.

[fol. 202] IN UNITED STATES DISTRICT COURT

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed October 7, 1949

To the Clerk:

Please prepare transcript of the record in the above entitled cause in the matter of appeal therein to the Supreme Court of the United States and include in said transcript the following:

1. Complaint.

2. The answer and defenses of defendant.

3. The amendment to the answer and motion to dismiss of defendant.

4. The request for admission under Rule 36 filed by plaintiff and the exhibits attached thereto.

5. Answer of defendant to request for admission.

6. Motions of plaintiff for judgment on pleading, summary judgment, or interlocutors injunction, and exhibits attached thereto.

7. Judgment entered August 10, 1949, and opinion of Court.

8. Motion for rehearing and to alter and set aside said judgment, filed August 19, 1949.
[fol. 203] 9. Amendment to said motion filed September 16, 1949.

10. Order entered October 3, 1949, modifying the opinion

and overruling said motion.

11. Petition for appeal to the Supreme Court.

12. Assignments of error.

13. Statement as to jurisdiction.

14. Order allowing appeal.

15. Citation, with proof of service.

46. Notice served on appellee of petition for appeal, order allowing appeal, assignments of error and statement as to jurisdiction, together with acknowledgment of service thereon.

17. This praccipe,

This the 7th day of October, 1949.

Robert B. Troutman, Furman Smith, Attorneys for Appellant.

Service of the foregoing praecipe acknowledged this the 7 day of October, 1949.

Eugene Cook, Attorney Gen., Attorneys for Appellee, by: J. R. Parham, Asst. Attorney Gen.

[fols. 204-208] IN UNITED STATES DISTRICT COURT

PRAECIPE OF APPELLEE-Filed October 18, 1949

To the Clerk:

Please include in the transcript of the record in the above entitled cause in the matter of appeal therein to the Supreme Court of the United States, the following:

- 1. The request for admission under Rule 36 filed by defendant.
 - 2. This Praecipe of defendant.

This the 18 day of October, 1949.

Eugene Cock, the Attorney General; M. H. Blackshear, Jr. Assistant Attorney General.

Note: Service omitted;

[fols. 209-210] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 211] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY AND DESIGNATION OF RECORD—Filed November 21, 1949

Pursuant to Rule 13, par. 9, appellant states that he intends to rely on all the points in his assignments of error, and the assignment of error is adopted as the statement of the points on which appellant intends to rely:

Appellant deems the entire record; as filed in the above entitled cause, necessary for consideration of the points relied upon.

Robert B. Troutman, Furman Smith, Attorneys for Appellant.

Due and legal service of the foregoing statement of the points on which appellant intends to rely and designation of the record acknowledged this the 18th day of November, 1949.

Eugene Cook, Attorney General; M. H. Blackshear, Jr., Asst. Atty. Gen'l, Attorneys for Appellee.

*[fol. 211a] [Pile endorsement omitted]

[fol. 212] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION-December 5, 1949

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

Mr. Justice Douglas took no part in the consideration or decision of this question.

Endorsed on Cover: File No. 54,203. U. S. D. C., Northern Georgia. Term No. 454., Georgia Railroad & Banking Company, Appellant, vs. Charles D. Redwine, State Revenue Commissioner. Filed November 12, 1949. Term No. 454 O. T. 1949.